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Title: Federal Election Commission, Appellant
v.
Massachusetts Citizens for Life, Inc.

Court: United States Court of Appeals
for the First Circuit

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EDITOR'S NOTE

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entry	Date	Note	Proceedings and Orders
1	Oct 25 1985	G	Statement as to jurisdiction filed.
2	Oct 25 1985		Logging received.
3	Nov 27 1985		Motion of appellee to affirm filed.
4	Dec 4 1985		DISTRIBUTED. January 10, 1986
5	Jan 13 1986		PROBABLE JURISDICTION NOTED. *****
6	Feb 20 1986		Record filed.
7	Feb 21 1986		Record filed.
8	Feb 21 1986		Certified copy of appendix, volumes I, II and III and proceedings received.
9	Feb 27 1986		Brief of appellant FEC filed.
10	Feb 27 1986		Joint appendix filed.
11	Feb 27 1986	G	Motion of Common Cause for leave to file a brief as amicus curiae filed.
12	Mar 10 1986		Motion of Common Cause for leave to file a brief as amicus curiae GRANTED. Justice Brennan OUT.
13	Apr 4 1986		Brief amicus curiae of Reporters Committee for Freedom of the Press, et al. filed.
14	Apr 4 1986	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
15	Apr 4 1986	G	Motion of Joseph M. Scheidler, et al. for leave to file a brief as amici curiae filed.
16	Apr 4 1986		Brief amicus curiae of Natl. Rifle Association filed.
17	Apr 4 1986		Brief amicus curiae of ACLU, et al. filed.
18	Apr 4 1986	G	Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae filed.
19	Apr 4 1986		Brief amicus curiae of Home Builders Assn. of MA filed.
20	Apr 4 1986		Brief of appellee MA Citizens for Life, Inc. filed.
21	Apr 8 1986		Logging received. 11 copies. (Box).
22	Apr 21 1986		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
23	Apr 21 1986		Motion of Joseph M. Scheidler, et al. for leave to file a brief as amici curiae GRANTED.
24	Apr 21 1986		Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae GRANTED.
25	Jul 15 1986		CIRCULATED.
26	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 7, 1986. (4th case) (1 hour).
27	Sep 15 1986		Application of appellant for leave to file a reply brief on the merits in excess of the page limitation filed

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30	Sep 30 1986	X Reply brief of appellant FEC filed.	
31	Oct 7 1986	ARGUED.	

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No.

Supreme Court, U.S.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEES.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT**

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Congress reached a permissible balance under the First Amendment to the Constitution of the United States in 2 U.S.C. § 441b, which requires all corporations and labor organizations to finance all of their expenditures in connection with federal elections from separate segregated funds containing contributions voluntarily designated for political purposes.

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FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

OPINION BELOW

The July 31, 1985 opinion of the court of appeals (App. A, *infra*) is published at 769 F.2d 13 (1st Cir. 1985). The June 29, 1984 decision of the United States District Court for the District of Massachusetts is published at 589 F. Supp. 649 (D. Mass. 1984) (App. B, *infra*).

JURISDICTION

This case arises from a suit filed by the Federal Election Commission pursuant to 2 U.S.C. § 437g

(a) (6) to enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("the Act").¹ The United States Court for the District of Massachusetts had original jurisdiction of the case pursuant to 28 U.S.C. § 1345, and the appellate jurisdiction of the United States Court of Appeals for the First Circuit was based upon 2 U.S.C. § 437g (a) (9) and 28 U.S.C. § 1291. On July 31, 1985 the First Circuit entered its final judgment, holding that respondent's corporate expenditures violated 2 U.S.C. § 441b, but finding that section unconstitutional as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation" (App. 24a). The Commission filed a timely notice of appeal in the United States Court of Appeals for the First Circuit on August 28, 1985 (App. D, *infra*). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

¹ The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 602, 91 Stat. 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), and by the Federal Courts Improvements Act, Pub. L. No. 98-620, 98 Stat. 3357 (1984).

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of 2 U.S.C. § 441b is reprinted in App. F, *infra*.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act prohibits "any corporation whatever" or any labor organization from utilizing treasury funds to finance contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b(a). It permits, however, the use of such treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." 2 U.S.C. § 441b(b) (2) (C). In turn, corporations and labor organizations are restricted to soliciting contributions to those separate segregated funds from a restricted class for unions, members and their families, and for corporations, stockholders, executive and administrative personnel, and their families and members of membership corporations. 2 U.S.C. § 441b(b) (4). Since the statutory definition of "political committee" expressly includes separate segregated funds, 2 U.S.C. § 431(4) (B), they are governed by the same reporting and disclosure requirements applicable to other political committees. See 2 U.S.C. §§ 433 and 434.

The Massachusetts Citizens for Life, Inc. ("MCFL") is a non-profit, non-stock, non-membership corporation incorporated under the laws of the Commonwealth of Massachusetts (App. 3a). Shortly before the September 19, 1978 Massachusetts primary elections, MCFL published and distributed a

flyer entitled "Special Election Edition." The flyer was headed "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." Every candidate for each office in Massachusetts was identified as either supporting a pro-life position or opposing a pro-life position on three issues which MCFL chose to highlight. The flyer expressly urged readers that "[n]o pro-life candidate can win in November without your vote in September Thus, your vote in the primary will make the critical difference in electing pro-life candidates." The last page of the flyer contained a form, captioned "VOTE PRO-LIFE," to be filled in with the pro-life candidates in the reader's district, and clipped out to take to the polls.²

MCFL had more than 100,000 copies of the Special Election Edition flyers printed for distribution (App. 4a).³ MCFL expended \$9,812.76 to prepare, print and distribute the flyers. MCFL paid the entire \$9,812.76 for the election flyer from the corporation's general treasury funds, for it did not establish its separate segregated fund until 1980 (App. 5a).

On May 1, 1979, a complaint was filed with the Commission alleging that MCFL had violated the Act

² Ten Copies of the Special Election Edition flyers, designated as Exhibits 1 and 2 of the District Court Complaint, App. E, *infra* have been lodged with the Court.

³ MCFL distributed a newsletter irregularly several times a year. Each of these regular newsletters included a newsletter masthead and carried a volume and issue number, neither of which appeared on the Special Election Edition. The regular newsletters contained articles of interest to MCFL members, information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information. MCFL had never distributed any of its regular newsletters to more than a few thousand recipients, and the October, 1978 newsletter was distributed to only 3,119 recipients. (App. 3a).

by utilizing corporate funds to distribute the Special Election Edition flyers. On June 27, 1979, the Commission found reason to believe that MCFL had violated 2 U.S.C. § 441b(a) and initiated an investigation. On October 21, 1980, the Commission found probable cause to believe that MCFL had violated 2 U.S.C. § 441b(a) by using corporate funds to prepare, print and distribute its Special Election Edition flyers to members of the general public. After the Commission's attempt to conciliate failed to produce an agreement that would correct or prevent the violation, the Commission authorized the filing of this civil action to enforce section 441b. (App. E, *infra*.)

B. The Decision Of The Court Below

The court of appeals rejected MCFL's arguments that its expenditures were not covered by 2 U.S.C. § 441b, and specifically found that those expenditures violated section 441b as alleged by the Commission⁴ (App. 15a). The court held that the Special Election Edition expressly advocated the election or defeat of clearly identified candidates, and that it did not fall within the statutory exemption for the media codified at 2 U.S.C. § 431(9)(B)(i) (App. 16a-19a). After a detailed examination of the legislative history, the court concluded "that section 441b prohibits

⁴ The district court had granted MCFL's motion for summary judgment because it had accepted the arguments rejected by the court of appeals and found that MCFL's expenditure of corporate funds did not violate section 441b. The district court also opined that if it had misinterpreted the Act, application of section 441b to MCFL's expenditures "would violate its rights to freedom of speech, press and association" (App. 38a).

expenditures in connection with federal elections as well as expenditures made to candidates for federal office (App. 6a-15a). Therefore, we hold that the expenditure in the instant case is embraced by the section 441b definition of expenditure." (App. 15a).

Although it thus found that MCFL's expenditure of corporate funds to produce and distribute the Special Election Edition violated section 441b, the court went on to conclude that as applied to expenditures by non-profit "ideological" corporations like MCFL, section 441b was unconstitutional (App. 24a). Although it apparently recognized that section 441b does not restrict corporate expenditures so long as they are financed through a separate segregated fund, the court found that the statute infringed the corporation's First Amendment rights by eliminating what the court viewed as a "simpler method" of financing such expenditures (App. 20a-21a). The court of appeals acknowledged that this Court identified several compelling governmental interests supporting section 441b in *FEC v. National Right to Work Committee*, 459 U.S. 197, 207-208 (1982), but concluded that MCFL's expenditures in this case did not pose the risks to the "integrity of the electoral process" which section 441b was enacted to prevent (App. 21a-22a). For these reasons, the court of appeals affirmed the district court's judgment in MCFL's favor, but on alternate constitutional grounds.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING UNCONSTITUTIONAL AN INTEGRAL AND LONG-STANDING PROVISION OF THE FEDERAL ELECTION CAMPAIGN ACT.

The issue presented by this appeal is the constitutionality of the Congressional judgment in enacting 2 U.S.C. § 441b, that all corporate and union political expenditures in connection with federal elections should be financed solely from a separate segregated fund containing contributions voluntarily designated for political purposes.⁵ The court of appeals, while acknowledging that the Act did not bar MCFL from making such expenditures through a separate segregated fund, found the provision unconstitutional as applied to "non-profit, ideological corporations" because it eliminates what the court considered the "simplest method" of financing political expenditures (App. 20a-24a).

Three years ago, this Court unanimously rejected a similar argument — that section 441b's prohibition on the expenditure of corporate treasury funds to solicit political contributions from the public at large was unconstitutional as applied to a corporation that is as non-profit and "ideological" as MCFL. *FEC v. National Right to Work Committee*, 459 U.S. at 209-210. "That case turned on the special treatment historically accorded corporations," *FEC v. National*

⁵ The court of appeals specifically found that MCFL's corporate expenditures violated 2 U.S.C. § 441b, but that the statute as applied to MCFL was unconstitutional. It is well settled that when a federal statute is found unconstitutional as applied, a direct appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a) is in order. *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947); *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982); *United States v. Darusmont*, 449 U.S. 292, 293 (1981).

Conservative Political Action Committee, 105 S. Ct. 1459, 1468 (1985), a consideration which is equally applicable here.* The decision of the court below to single out "non-profit, ideological corporations" for a constitutional exemption from Congress' longstanding regulation of the financing of corporate and union expenditures to influence federal elections cannot be reconciled with this Court's conclusion in *National Right to Work Committee*, 459 U.S. at 206-211, that the First Amendment does not require Congress to treat such corporations differently under section 441b.

* The Eleventh Circuit, sitting *en banc*, unanimously found this Court's reasoning in *FEC v. National Right to Work Committee* to compel upholding section 441b's prohibition on the use of corporate and union treasury funds to make expenditures in connection with federal elections. *Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (answering in the negative questions listed at 689 F.2d 1006, 1015-1016 (1982)), *appeal dismissed, cert. denied*, 104 S. Ct. 1580 (1984). The courts have upheld 2 U.S.C. § 441b and its predecessors against similar First Amendment challenges in a variety of circumstances. See *California Medical Association v. FEC*, 453 U.S. 182, 193-201 (1981); *United States v. Chestnut*, 394 F. Supp. 581, 588-591 (S.D.N.Y. 1975), *affirmed*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *International Association of Machinists v. FEC*, 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), *affirmed mem.*, 459 U.S. 983 (1982); *Bread Political Action Committee v. FEC*, 635 F.2d 621, 626-633 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982); *United States v. Boyle*, 482 F.2d 755, 763-764 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Pipefitters*, 434 F.2d 1116, 1122-1123 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, 1128, *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC v. National Education Association*, 457 F. Supp. 1102, 1109 (D.D.C. 1978); *FEC v. Weinstein*, 462 F. Supp. 243, 246-249 (S.D.N.Y. 1978); *United States v. Clifford*, 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976).

As we show below, the court of appeals' decision here, if allowed to stand, will substantially alter federal election campaigns by permitting, for the first time in almost forty years, the unlimited use of corporate and union treasury funds for political expenditures with no public disclosure of the actual sources of such financing. Just last Term, this Court noted that it had not yet been presented with a case requiring it to reach "the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1468. The constitutionality of this longstanding federal statute regulating the financing of such expenditures is an unresolved question of significant national importance, which merits plenary consideration by this Court.

A. Section 441b Does Not Restrict Political Speech.

As stated by the sponsor of the 1971 amendments to the predecessor of section 441b, Congress intended that provision to prohibit only "the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates. . . ." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen) (emphasis added), *quoted in Pipefitters v. United States*, 407 U.S. 385, 431 (1972). To make this limited purpose clear, Congress in 1971 enacted an explicit exception from the statute's prohibitory language, now codified at 2 U.S.C. § 441b (b) (2) (C), which allows corporations and unions to use their treasury funds to operate a voluntary separate segregated fund for political purposes. A "separate segregated fund may be completely controlled

by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *FEC v. National Right to Work Committee*, 459 U.S. at 200 n.4. See also *Pipefitters v. United States*, 407 U.S. at 414-417; *Buckley v. Valeo*, 424 U.S. 1, 28 n.31 (1976). The corporation or union operating the fund can use its own treasury money to pay the fund's administrative costs and to solicit contributions from the corporation's or union's members, stockholders and executive and administrative personnel, and their families. 2 U.S.C. § 441b(b) (4).

Thus, the Act is carefully limited to restricting only the corporation's or union's use of its treasury funds to make contributions or expenditures to influence federal elections; it expressly permits the corporation or union, through its separate segregated fund, to contribute up to \$5,000 directly to any candidate and to make unlimited independent expenditures communicating to the public the corporation's or union's support for, or opposition to, any candidate. Indeed, section 441b would not prohibit MCFL's distributing the same election flyers to the same people in the same manner it did here, so long as it finances it through a separate account containing contributions voluntarily designated for political purposes.⁷

There is nothing in the record of this case to justify the court of appeals' failure to defer to Congress' considered judgment that the financial regulations contained in 2 U.S.C. § 441b represent a permis-

⁷ In fact, MCFL did establish such a separate segregated fund in 1980, and has reported to the Commission having made expenditures from that fund in every federal election cycle since.

sible constitutional balance.⁸ More than 2900 separate segregated funds have been established by corporations and unions, which reported to the Commission receiving \$185.6 million in voluntary political contributions and expending \$169.1 million on contributions and expenditures during the 1983-84 election cycle. See *FEC Reports on Financial Activity 1983-1984*, Vol. I at p. 78 (May 1985). This graphically demonstrates that, in contrast to the statutes this Court found unconstitutional in such cases as

⁸ In 1971, when the exception expressly permitting establishment of separate segregated funds was added to section 441b, Congress carefully weighed the constitutional considerations. As summarized by Congressman Hansen, the author of the 1971 amendments:

[T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject . . . and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language.

117 Cong. Rec. 43,381 (1971), quoted in *Pipefitters v. United States*, 407 U.S. at 431. This conscious conclusion by Congress is entitled to substantial deference from the courts. *FEC v. National Right to Work Committee*, 459 U.S. at 209, citing *Rostker v. Goldberg*, 453 U.S. 57, 64, 67 (1981). See also, e.g., *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-3189, 3193 (1985); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 103 (1973).

First National Bank of Boston v. Bellotti, 435 U.S. 765, 775-795 (1978); *Buckley v. Valeo*, 424 U.S. at 39-59; and *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1465-1471, section 441b has not had the effect of limiting the free flow of political information and opinion from corporations and unions to the public.

The court of appeals did not dispute the Commission's showing that section 441b has not had the effect of limiting corporate or union political speech. Instead, the court found the statute unconstitutional because it eliminated what the court considered "the simplest method" of financing corporate speech (App. 20a). While the Act's administrative requirements for political committees, 2 U.S.C. §§ 432-434, are applicable to separate segregated funds as well, this Court has never suggested that the First Amendment entitles corporations to employ a "simpler method" of financing political expenditures than is available to others who wish to engage in group political expenditures. As we have shown, section 441b leaves the amount and content of a separate segregated fund's expenditures unrestricted, and "it is well settled that '[t]he [First] Amendment does not forbid . . . regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.'" *Lowe v. SEC*, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring), quoting *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 193 (1946). Cf. *Regan v. Taxation With Representation*, 461 U.S. 540, 545, 549 (1983) (upholding Congress' requirement that corporations exempt from federal taxation under 26 U.S.C. § 501 (c)(3) must finance their lobbying efforts through a separate, affiliated corporate entity). Indeed, this

Court has upheld virtually all of the Act's requirements with respect to federal campaign financing without ever finding it necessary to determine whether there was a "simpler method" available.⁹ The court of appeals cited no case in which this Court has ever found a statute which did *not* limit speech to violate the First Amendment merely because it makes the task of financing less "simple".¹⁰

The court of appeals' assertion (App. 21a, n.7) that the First Amendment requires a general exemption from section 441b for corporations like MCFL because of the statute's requirement of disclosure of certain contributors to all political commit-

⁹ See, e.g., *FEC v. National Right to Work Committee*, 459 U.S. at 207-211 (limitation on use of corporate funds to solicit contributions to finance political activities); *Buckley v. Valeo*, 424 U.S. at 23-38 (prohibition of contributions to publicly financed candidates); *id.* at 60-82 (upholding reporting and recordkeeping requirements for political committees and individuals); *California Medical Association v. FEC*, 453 U.S. at 197 (limitation upon contributions to political committees). The Court has similarly upheld against First Amendment challenges a variety of statutes regulating the financial and business operation of newspapers, where the statutes were nondiscriminatory and did not restrict the newspapers' expression. See cases discussed in *Branzburg v. Hayes*, 408 U.S. 665, 682-683 (1972).

¹⁰ *Linmark Associates v. Willingboro*, 431 U.S. 85, 93-94 (1977) and *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974), relied upon by the court of appeals (App. 20a-21a), are not on point. In those cases the Court concluded that the availability of alternative means of communication did not save statutes that prohibited a particular method of speech. Section 441b does not affect the method of communication employed by corporations and unions; so long as it is financed out of a separate segregated fund, a corporation or union can utilize any method of communication it desires.

tees, including separate segregated funds, was effectively rejected by this Court long ago. In *Buckley v. Valeo*, 424 U.S. at 68, this Court upheld the reporting requirement against First Amendment attack as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." The Court then rejected the argument that the First Amendment entitles fringe groups to a blanket exemption from the reporting requirement, and ruled that exemption from the Act's reporting requirements is constitutionally mandated only if a group presents specific evidence that it is likely that its contributors will be subjected to harassment if their names were disclosed. *Buckley v. Valeo*, 424 U.S. at 72-74. See also *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91-98 (1982). The court of appeals did not even attempt to explain why these principles would not be as applicable to MCFL as to any other group. See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2282 n.14 (1985).¹¹

In sum, there has been no showing in this case that section 441b has interfered at all with the freedom

¹¹ The court of appeals' further observation that some corporations might not find the separate segregated fund option palatable because they have chosen to be nonpartisan is not relevant to this case. As the court of appeals concluded (App. 16a), the expenditure in this case was for a flyer that expressly advocated the election or defeat of specified federal candidates. If a case ever arises in which a non-profit corporation is charged with violating section 441b by making an expenditure to publish a nonpartisan statement, the applicability of section 441b in such circumstances can be resolved at that time; it is not presented by this case. See *California Medical Association v. FEC*, 453 U.S. at 197 n.17.

of corporations and unions to expend as much as they want, through their separate segregated funds, to publicize their views on federal candidates. In the absence of such a showing, the court of appeals' decision to strike down section 441b as applied on First Amendment grounds cannot stand.

B. Section 441b Serves Compelling Governmental Purposes.

Even if the court of appeals were correct in concluding that section 441b indirectly burdens corporate and union political speech to some extent by making fundraising less "simple", the statute should nevertheless be upheld.

[I]t is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v. [National Ass'n of] Letter Carriers*, 413 U.S. 548, 567 (1973). Even a "significant interference" with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

Buckley v. Valeo, 424 U.S. at 25, quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975). Accord *FEC v. National Right to Work Committee*, 459 U.S. at 207.

Section 441b serves several purposes which this Court has already found to be compelling. First, it is intended to ensure that the wealth which corporations and unions are able to accumulate with the aid of special legal protections intended to serve other purposes cannot be diverted to the electoral process to incur political debts from candidates for federal elective office. See *FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*,

352 U.S. 567, 579 (1957). Corporations are artificial entities whose accumulation of capital is enhanced by such special advantages as limited liability, perpetual life, and special tax treatment. As such, corporations "are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Such "[f]avors from government often carry with them an enhanced measure of regulation." *Id.* See also *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1469.

As this Court has previously explained,¹² Congress acted to prevent the diversion of the assets of corporations and unions to the political sphere only after it became aware of widespread abuses which were thought to present imminent danger of corruption of the federal election process, resulting in a decline of public confidence in the integrity of elected officials and the fair operation of government. This Court has repeatedly recognized the elimination of such circumstances to be a governmental interest of the highest order,¹³ so that the "careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to

¹² *FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*, 352 U.S. at 570-584.

¹³ See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. at 788 n.26; *Buckley v. Valeo*, 424 U.S. at 27; *United States v. UAW*, 352 U.S. at 570, 571, 575.

the electoral process." *FEC v. National Right to Work Committee*, 459 U.S. at 209.

The court below found this purpose to be inapplicable here because "MCFL's expenditures did not incur any political debts from legislators" (App. 22a). However, the same could be said about the independent expenditures for solicitations made by the National Right to Work Committee; in fact, the court of appeals in that case concluded that such independent "solicitation, without more, will neither corrupt officials nor distort elections." *National Right to Work Committee v. FEC*, 665 F.2d 371, 375 (D.C. Cir. 1981), *rev'd*, 459 U.S. 197 (1982). In reversing that decision, this Court emphasized that the constitutionality of section 441b was not to be judged by evaluating the effects on the electoral process of the particular expenditure at issue. Rather, this Court found section 441b to be a valid "prophylactic measure[]" aimed at "the special characteristics of the corporate structure", and concluded:

While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation.

FEC v. National Right to Work Committee, 459 U.S. at 210. As was true of the National Right to Work Committee, MCFL's corporate structure carries the potential for influence which is the proper object of Congressional regulation; whether or not debts were actually incurred in this case does not alter the constitutional analysis.

The second purpose behind section 441b "is to protect the individuals who have paid money into a cor-

poration or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States v. CIO*, 335 U.S. 106, 113 (1948).” *FEC v. National Right to Work Committee*, 459 U.S. at 208. This emphasis upon ensuring that individuals have the opportunity to make an informed and voluntary choice as to whether their money can be used by others to support political candidates (see, e.g., 2 U.S.C. § 441b(b)(3)(C)), safeguards the individual’s First Amendment interest in not being required to contribute to the support of any political candidates against his or her will.¹⁴ It also furthers the important governmental interest in “sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government,” by guaranteeing each individual the opportunity to make a personal decision about the political options he or she will support. *First National Bank of Boston v. Bellotti*, 435 U.S. at 788-789, quoting *United States v. UAW*, 352 U.S. at 575.

The court of appeals’ conclusion that contributors to an ideological corporation like MCFL do not need this protection was candidly based upon a presumption, without any supporting evidence, that anyone who supported MCFL’s anti-abortion position would necessarily be willing to contribute to its efforts to elect candidates (App. 22a-23a). However, there is no reason to assume that individuals who oppose abortion necessarily use this as the sole criterion for choosing candidates, or that they are any less interested than

¹⁴ See generally *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Employees’ Dept. v. Hanson*, 351 U.S. 225 (1956).

other Americans in being able to decide for themselves whether their money will be used to assist candidates for federal office, and if so, which candidates it will be used to support. Instead of merely trusting MCFL to make their political decisions for them, such individuals might prefer to make such choices in other ways; for example, they might choose to follow party loyalty in electoral politics, or they might favor a candidate that does not oppose abortion because of that candidate’s positions on a variety of other issues they consider important.

Even if the court’s presumption were correct, however, it would not justify rejecting the Congressional judgment. If all of MCFL’s contributors were willing to support its political expenditures, as the court believes, MCFL would have no more trouble obtaining contributions to its separate segregated fund than to its corporate treasury. If, on the other hand, even a handful of the individuals who contribute to MCFL’s campaign to outlaw abortion would prefer to reserve to themselves the choice of when and how their money will be used to support candidates, the statute will have served an important purpose. In either event, it is up to Congress, not the court of appeals, to determine the desirability of ensuring an opportunity for corporate contributors to make an informed choice in this important area. See *Walters v. National Association of Radiation Survivors*, 105 S. Ct. at 3190.¹⁵

¹⁵ The legislative history shows that Congress considered this purpose to apply fully to non-profit corporations whose money comes from ideological adherents. In fact, Senator Taft, whose views on the reach of this statute this Court found to be “controlling” in *Pipefitters v. United States*, 407 U.S. at 409, stated that under the statute, even corporations organized for religious purposes “cannot take the church members’ money and use it for the purpose of trying to elect a candidate

Finally, a third compelling interest undermined by the court of appeals' decision is the public disclosure of the sources of federal campaign financing. The Act as a whole reflects "Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Buckley v. Valeo*, 424 U.S. at 76. Section 441b serves this purpose by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund which, as a political committee, is required to report both its expenditures and its sources of funding for disclosure on the public record. 2 U.S.C. § 434. This Court has found Congress' interest in public disclosure of the sources of campaign spending to be compelling even when applied to those making independent expenditures rather than contributions, since "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constitutencies." *Buckley v. Valeo*, 424 U.S. at 81.

If the court of appeals' decision is permitted to stand, the voting public will be denied the identities of the individuals who finance the political expenditures of corporations like MCFL, information which Congress has reasonably determined to be important to maintenance of an informed electorate. In fact, as discussed *supra*, pp. 13-14, the court of appeals indicated that eliminating this disclosure requirement was one of the objectives of its decision.

or defeat a candidate, and they should not do so." 93 Cong. Rec. 6437 (1947).

Moreover, it is not only the identity of individual contributors that will be withheld from the public. Although it appears that MCFL presently may have a voluntary policy against accepting money from corporations, there is no legal bar to other non-profit, apparently "ideological" corporations covered by the lower court's decision accepting funding from commercial corporations having a financial interest in the causes they advocate.¹⁶ The court of appeals' decision would, for the first time, permit such corporations to convert unlimited amounts of money from corporations with substantial commercial interests into campaign expenditures, without ever disclosing to the public the true source of financing. Thus, despite the court of appeals' assumption that its decision only invalidates section 441b's requirements with respect to non-profit, "ideological" corporations, this decision's actual effect is to open an avenue that could be utilized by *any* corporation or union to transfer unlimited amounts of their treasury funds into political expenditures, while keeping the actual source of the financing secret.

In sum, political expenditures by corporations are not restricted by section 441b; only the manner of financing such expenditures is affected, and corporations and unions have been demonstrably successful in

¹⁶ For example, an organization engaged in apparently "ideological" opposition to nuclear power might receive funding from a corporation engaged in coal mining that is interested in reducing its competition, or an organization engaged in apparently "ideological" advocacy of increased defense spending could be funded primarily by defense contractors. Cf. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981), ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.")

utilizing the financing methods specified by the statute. Compelling governmental interests support the statute's requirements and it is narrowly drawn to serve those interests without unnecessarily infringing upon corporate and union political activity. In these circumstances, the court of appeals' decision to strike down section 441b as applied is an unwarranted infringement upon Congress' authority to legislate to protect the integrity of the federal electoral process.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant Federal Election Commission respectfully requests that this Court note probable jurisdiction in this appeal, and set this case for briefing and argument on the merits.

Respectfully submitted,

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OCTOBER 25, 1985

APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr., *U.S. District Judge*]

Before
Breyer, *Circuit Judge*,
Rosenn,* *Senior Circuit Judge*,
and Torruella, *Circuit Judge*.

July 31, 1985

Richard B. Bader, Assistant General Counsel, with
whom *Charles N. Steele*, General Counsel, *Lisa E.*
Klein and *Carol A. Laham* were on brief for
appellant.

* Of the Third Circuit, sitting by designation.

Francis H. Fox with whom *E. Susan Garsh*, *Alexandra Leake*, *Robin A. Driskel* and *Bingham, Dana & Gould* were on brief for appellee.

James O'Connell, *Sally O'Connell & Fitch*, *Jack C. Landau*, *Jane E. Kirtley*, *Harry L. Baumann*, *Steven A. Bookshester*, *J. Laurent Scharff*, *Pierson, Ball & Dowd*, *Richard N. Winfield* and *Rogers & Wells*, were on brief for The Reporters Committee for Freedom of the Press, National Association of Broadcasters, Radio-Television News Directors Association and Associated Press Managing Editors, *Amici Curiae*.

James J. Featherstone and *Santarelli and Bond* on brief for National Rifle Association of America, *Amicus Curiae*.

Majorie Heins and *Elaine Millar* on brief for the Civil Liberties Union of Massachusetts, *Amicus Curiae*.

Joseph D. Alviani and *Marcia Drake Seeler*, New England Legal Foundation on brief for Home Builders Association of Massachusetts, *Amicus Curiae*.

ROSENN, *Circuit Judge*. In an effort to curb misuse of corporate funds and preserve integrity in the federal election process, Congress enacted a series of laws prohibiting corporate expenditures and contributions to political campaigns. This appeal presents the question of whether the current statute, codified at 2 U.S.C. § 441b (1982), prohibits the publication by a non-profit ideological organization of a Special Election Edition containing the voting records of federal candidates on a particular issue of interest to the organization's members and whether such a prohibition may be constitutionally applied in the instant case. The United States District Court for the District of Massachusetts held that the publication was not covered by the statute, and that, in

the alternative, prohibition of the publication would violate the organization's first amendment rights. The plaintiff Federal Election Commission (FEC) appealed. We affirm.

I.

The defendant Massachusetts Citizens for Life, Inc. (MCFL) is a Massachusetts non-profit, non-membership corporation, organized "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through education, political and other forms of activities."

Despite its legal status as a non-membership corporation, the organization claimed three classes of "members" in 1978: "dues paying members" who contributed \$15.00 per year to the organization; "contributing members" who contributed money to the organization in amounts less than \$15.00 per year; and "non-contributing members" who neither paid dues nor contributed money but who had indicated somehow their support for the organization's goals.

For several years, MCFL published a newsletter at somewhat irregular intervals.¹ "Dues-paying and contributing members" automatically received the MCFL newsletter by mail, as did "non-contributing members" when funds were available. The May 1978 newsletter was mailed to 2,109 people; the mailing list for the October 1978 newsletter contained 3,119 names. The MCFL newsletter typically contained information about MCFL activities, solicitations for volunteers and contributions, material on political, administrative, judicial, and legislative developments,

¹ The newsletter was published three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978.

and appeals to members to contact legislators and express their support of the anti-abortion position.

In periods prior to elections, MCFL published "Special Election Editions." In September 1978 it printed 100,000 copies of a publication captioned "Special Election Edition" with headlines reading **EVERYTHING YOU NEED TO VOTE PRO-LIFE**. The publication contained no masthead identifying it as a special edition of the MCFL newsletter. The MCFL logo did appear at the top of the publication, and the words "Volume 5, No. 3, 1978" appear to have been handwritten in below the logo by someone on the copy supplied to the court by the FEC.

The publication contained the voting records on abortion-related issues of many candidates for federal and state offices. It included at least two exhortations to "vote pro-life" and the statement that "No pro-life candidate can win in November without your vote in September." The publication contained photographs only of those candidates who were considered "pro-life." At the back of the publication, beside the exhortation "Vote Pro-Life," MCFL printed a disclaimer stating "This special election edition does not represent an endorsement of any particular candidate."

Shortly thereafter, MCFL printed and distributed 20,000 copies of a Complimentary Partial Special Election Edition, apparently for the purpose of correcting minor errors in the earlier edition. This edition did not contain a volume and number designation below the MCFL logo.

Copies of the two Special Election Editions were distributed to 5,985 MCFL contributors and 50,674 non-contributors. MCFL also sent copies to local chapters, presumably for distribution to their members, and mailed copies to individuals who requested

them. The FEC contends that the rest of the copies were left in public areas for general distribution.²

MCFL spent a total of \$9,812.76 from its general treasury on the two publications. The FEC found probable cause to believe that MCFL violated 2 U.S.C. § 441b(a) by printing the flyers and distributing them to the general public. When conciliation proved unsuccessful, the FEC filed a complaint pursuant to 2 U.S.C. § 437(g)(a)(6)(A) (1982), seeking a civil penalty and such other relief as the court deemed appropriate.

The parties filed cross-motions for summary judgment, and the court granted summary judgment for MCFL, holding that the two publications did not fit within the meaning of "expenditure" as the term is used in 2 U.S.C. § 441b(b)(2) (1982). It also held that the publications were exempted from the prohibition against expenditures by 2 U.S.C. § 431(9)(B)(i) (1982), which exempts "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

The court also concluded that if section 441b were applied to prohibit MCFL's expenditures in connection with the publication in question, the statute

² The FEC submitted an affidavit from Jean Weinberg, not a member of MCFL, who certified that she obtained a copy of the Special Election Edition at a statewide conference of the National Organization of Women. Weinberg averred that she obtained her copy from a stack of about 200 which were available to the general public. MCFL states that it made no copies of the Special Election Edition available to the general public.

would be unconstitutional, violating the organization's rights of freedom of speech, press, and association.

II.

Section 441b(a) provides in part:

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a *contribution or expenditure* in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office

(Emphasis added.) Section 441b(b)(2) provides that the term "contribution or expenditure" shall *include*

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) *to any candidate*, campaign committee, or political party or organization, in connection with any election

2 U.S.C. § 441b(b)(2) (emphasis added). This section refers to election expenditures by corporations, which the Act prohibits, except if such expenditures are made from separate segregated funds.

The general definitions section of the Federal Election Campaign Act contains a broader definition of expenditure which "includes"

any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person *for the purpose of influencing* any election for Federal office

. . . .

2 U.S.C. § 431(9)(A)(1) (1982) (emphasis added). This section would seem to apply to the entire Act, including the provisions relating to disclosure by political and campaign committees and to limitations on individual expenditures.

Before the district court and on appeal, the FEC contended that the broader definition set forth in section 431(9)(A)(1) should control in the instant case. Even if the section 441b definition only were to be applied, the FEC argues, the use of the word "include" indicates congressional intent that other activities besides payments to a candidate may be considered contributions or expenditures. The district court, however, concluded that the section 441b(b)(2) definition was intended to be exclusive, because in the court's view, the following provision amounted to an adoption in the general definition section solely of the section 441b(b)(2) definition:

(B) The term "expenditure" does not include—

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization.

2 U.S.C. § 431(9)(B)(v).

On appeal, the FEC contends that section 431 does not adopt the narrower section 441 definition and that

the broader section 431 definition should apply to corporate expenditures.

The presence of the word "include" in section 441b leaves open the possibility that "contribution or expenditure" could encompass more than payments to a candidate, campaign committee, or business organization.

A term whose statutory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." It has been said "the word 'includes' is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated"

2A N. Singer, *Sutherland Statutes and Statutory Construction* 133 (4th ed. 1984), (quoting *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968)). See *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941), *United States v. Mass. Bay Transportation Authority*, 614 F.2d 27, 28 (1st Cir. 1980) ("Includes is not a finite word of limitation").

The presence of section 431(9)(B)(v) alone does not indicate that section 441b(b)(2) should be read as though it contained the word "means" instead of "includes." Section 431(9)(B)(v) provides only that the definition of "expenditure" with regard to individual contributions shall be no broader than the definition with regard to corporate contributions.

Therefore, the plain language of the statute suggests that "expenditure" in both contexts includes but is

not limited to contributions to candidates, campaign committees, or political organizations.³

Ordinarily, the starting point in every case involving statutory construction is the statute itself, *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), but where the statute is ambiguous, legislative history should be consulted. See *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969). Because the two statutory definitions of "expenditure" create some ambiguity, we turn to the legislative history for aid in determining the full scope of the definition of expenditure under section 441b.

2 U.S.C. § 441b originated in the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 865 (1907), which prohibited all corporations from making money contributions "in connection with" elections. The statute was codified at 18 U.S.C. § 610 by the Federal Corrupt Practices Act, Pub. L. No. 68-506, § 302, 43 Stat. 1070, 1071 (1925) (prohibiting corporate expenditures and contributions of "anything of value" to federal candidates) and extended to unions by the War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167 (1943). The statute as amended by the Taft-Hartley Act, Pub. L. No. 80-101 § 304, 61 Stat. 136, 159 (1947), prohibited any corporation or labor organization from making "a contribu-

³ In *Reader's Digest Ass'n v. Federal Election Commission*, 509 F. Supp. 1210, 1213, n.2 (S.D.N.Y. 1981), which involved distribution of video tapes by the Reader's Digest to other media outlets, the court noted that Reader's Digest maintained that "the expenditures in question are not prohibited by the statute, since they were not made to any 'candidate, campaign or political party or organization.'" The court added, "However, the statute also covers indirect payments." *Id.*

tion or expenditure in connection with any election . . ." for federal office. *Id.*, quoted in *United States v. UAW*, 352 U.S. 567, 568-69 (1957) (emphasis added).

The legislative history of the Taft-Hartley Act includes the 1946 report of the House Special Committee to Investigate Campaign Expenditures which stated:

The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term "making any contribution" related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?

H.R. Rep. No. 2739, 79th Cong., 2d Sess. 36-37 (1947), quoted in *United States v. UAW*, 352 U.S. at 581. The committee recommended that the statute

be clarified so as to specifically provide that expenditures of money for salaries to organizers, purchase of radio time, and other expenditures by the prohibited organizations in connection with elections, constitute violations of the provisions of said section, whether or not said expenditures are with or without the knowledge or consent of the candidates.

Id. at 46 (italics omitted), quoted in *United States v. UAW*, 352 U.S. at 582.

During congressional debate on the bill that was ultimately enacted, Senator Taft observed that the term "expenditure" would include any advertisement or newspaper published for political purposes by a union or corporation.

[W]e have long prohibited corporations from contributing money for political purposes, and it was always supposed that the law prevented a corporation from operating newspapers for that purpose or advertising in newspapers for that purpose, until labor organizations were included . . . and then it was said that the law prohibited contributions, but that political advertisements and political pamphlets could be published by the union or corporation itself.

So what we are proposing to do is to subject labor organizations to exactly the same prohibition to which corporations have been subjected, and, so far as I know, including the things which I think the original law covered but regarding which doubt was raised by labor organizations.

93 Cong. Rec. 6436 (1947).

The following exchange clarifies Senator Taft's position:

Mr. Pepper. . . . Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the presidency next year, and in opposition to the Senator from Ohio, if he should be the Republican nominee for the

Presidency, stating that President Truman was a friend of labor and that Senator of Ohio was not friendly to labor? Would that be called a political expenditure on the part of the labor organization?

Mr. Taft. If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another The prohibition is against a labor organization using its funds either as a contribution to a political campaign or as a direct expenditure of funds on its own behalf.

93 Cong. Rec. 6436-37 (1947).

The foregoing language of Senator Taft indicates his intent that a special election edition of a union or corporate newsletter constitutes a prohibited expenditure under the Act. The Supreme Court provided a gloss to the congressional debate with its comment in *United States v. CIO*, 335 U.S. 106, 121 (1948), noting:

If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

(Footnote omitted.) The Court held that the statute did not prohibit the publication of an edition of the

weekly *CIO News* which was published with union funds, distributed only to union members or purchasers of the issue, and carried a statement by the CIO president urging all members to vote for a certain congressional candidate.

The Court concluded that "[a]pparently 'expenditure' was added to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section," *CIO*, 335 U.S. at 122 (footnote omitted), and stated that "[i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ, or a newspaper, published by a corporation, from expressing views on candidates . . . in the regular course of its publication." *Id.* at 123.

In *United States v. UAW*, 352 U.S. 567 (1957), the Supreme Court held that expenditure of union dues to sponsor political advertisements on commercial television violated the prohibition against corporate or labor organization expenditures in connection with an election for federal office. The Court examined extensively the legislative history of the Taft-Hartley Act, and concluded that Congress added the term "expenditure" to the statute precisely to embrace indirect campaign contributions such as union-sponsored political advertisements. *UAW*, 352 U.S. at 585. The Court distinguished *CIO* on the ground that the CIO newspaper was distributed only to union members and newspaper purchasers, not to the general public. *United States v. UAW*, 352 U.S. at 589. The evil at which Congress aimed, the Court observed, "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *Id.*

In 1971, the Federal Election Campaign Act added the following language to the statute:

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, political party or organization, in connection with any election to any of the offices referred to in this section

Pub. L. No. 92-225 § 205, 86 Stat. 3, 10 (emphasis added) and provided for the establishment of separate segregated funds to be used for political purposes. *Id.* Representative Hansen, who sponsored the bill, explained that

The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election.

He added that

The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18, United States Code, and to codify the case law.

117 Cong. Rec. H43379 (1971). Nothing in Representative Hansen's remarks indicates that the change in language from "in connection with any federal election" to "to any candidate . . . in connection with

any election" was meant to narrow the scope of section 610. See *Pipefitters Local Union 562 v. United States*, 407 U.S. 335, 410-411 (1972).⁴ In short, nothing in the legislative history suggests that Congress meant to narrow the prohibition of expenditures "in connection with" a federal election by the 1971 addition of the phrase "to any candidate." We conclude that section 441b prohibits expenditures in connection with federal elections as well as expenditures made to candidates for federal office. Therefore, we hold that the expenditure in the instant case is embraced by the section 441b definition of expenditure.

III.

The district court opinion suggests that even if section 441b on its face were interpreted to preclude the expenditure in the instant case, the section 441b definition of expenditure should be read to incorporate the "express advocacy" requirement set forth in *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). The court concluded that the MCFL publications did not expressly advocate the election or defeat of any particular candidate, and therefore would not come within the scope of section 441b. We do not decide

⁴ The statute was amended again in 1976, in response to *Buckley v. Valeo*, 424 U.S. 1 (1972). In *Buckley*, the Court construed the term "expenditure" as used in the individual expenditure limitation sections to mean express advocacy of the election or defeat of a particular candidate. 424 U.S. at 44. This narrowing gloss was incorporated into the individual expenditure section of the statute in 1976 when the section prohibiting corporate and union expenditures was transferred from 18 U.S.C. § 610 to 2 U.S.C. § 441 by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-293, § 102, 90 Stat. 475, 478.

whether the section 441b definition of expenditure includes an "express advocacy" requirement, because we conclude, contrary to the district court, that the MCFL publication would fit within the definition of expenditure, even if an express advocacy requirement were incorporated into the definition.

The *Buckley* Court stated that "explicit words of advocacy of election or defeat of a candidate include 'vote for,' 'elect,' 'support,' 'Smith for Congress,' 'defeat,' 'reject,' etc." *Buckley*, 424 U.S. at 44, n.52. The statement "Vote Pro-Life" does not fit within the *Buckley* definition of express advocacy because it does not advocate the election of particular candidates for particular offices, but urges support of a general position on a controversial issue. Compare the instant case with *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980). The MCFL Special Election Edition, however, explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only. It reminded the reader that "your vote in the primary will make the critical difference in electing pro-life candidates."⁵ Thus, the Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley*. *Id.*

IV.

The district court concluded that, even if the Special Edition amounted to express advocacy, it was exempt from § 441b because it constituted a periodi-

⁵ The disclaimer stating that "this special election edition does not represent an endorsement of any particular candidate" does not negate the expressions of advocacy in the publication.

cal publication. 2 U.S.C. § 431(9)(B)(i) (1982) exempts from the reach of the statute "any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

The district court stated that the Special Election Editions were similar in newsprint, sheet form size and format to the MCFL Newsletter, which "typically filled 6-10 pages of newsprint and included explanations and endorsements of its opposition to abortion, reports of political developments and judicial rulings on abortion-related issues, announcements of social activities for members, and appeals for funds."

The court observed that the sparse legislative history of the exemption indicates that Congress intended the exemption to be interpreted broadly, co-extensive with the First Amendment. Finally, the court noted that, according to the legislative history, the exemption was intended to codify existing law, presumably including dicta from *United States v. CIO*, 335 U.S. 106, 123 (1948), to the effect that "it would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ, or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication."

We believe the Special Election Editions themselves do not constitute newspapers, magazines or periodical publications within the meaning of the statute. MCFL published these editions not periodically, but sporadically, and only during federal election campaigns. Moreover, at least 50,000 copies of

the special editions were distributed at no cost to a large number of people; and the editions contained no printed volume or issue number nor any masthead designating them as newspapers or periodicals.*

Defendant argues, however, that the regular MCFL newsletter is a newspaper, magazine, or periodical publication, and that the Special Election Editions may be considered news stories, commentaries or editorials distributed through the newsletter's facilities. However, even assuming that the regular MCFL newsletters may be considered periodical publications, this argument must fail. The circulation of the Special Election Editions constituted approximately *twenty times* that of any edition of the regular newsletter. The Special Editions did not carry the masthead of the MCFL Newsletter; nor did they contain a printed volume and issue number. Although they bore some physical resemblance to the regular newsletters, nothing in the editions informed the reader that the editions were at all related to the MCFL newsletter. In fact, the editions were published by a staff that produced no previous or subsequent newsletters. Under the circumstances, the Special Editions may not be considered news stories, commentaries, or editorials because the editions were not distributed through the newsletter's facilities, were not published by the newsletter staff, did not contain the

* It is undisputed that MCFL printed 100,000 copies of the 1978 Special Election Edition and 20,000 copies of the Complimentary Partial Election Edition. In its answers to interrogatories, MCFL stated it had 5,633 "contributing and dues-paying members" in 1976, 5,148 in 1977, and 5,985 in 1978. During this period it published a total of seventeen newsletters. Apparently, only the election editions, published in 1976 and 1978, were distributed to persons who did not contribute financially to the organization.

newsletter masthead, and were not limited to the usual MCFL newsletter circulation.

Neither may the publication of the Special Editions be considered one of the "normal functions of a press entity." *Federal Election Comm'n v. Phillips Publishing Co.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981). In *Phillips Publishing*, the court held that printing and distributing a letter soliciting subscriptions was a normal, legitimate press function and therefore was covered by the press exemption. Similarly, in *Reader's Digest Association v. Federal Election Comm'n*, 509 F. Supp. 1210 (S.D.N.Y. 1981), the court concluded that dissemination of a tape for the purposes of publicizing the magazine would fall within the press entity's legitimate function, and would be covered by the exemption. It is arguable that under certain circumstances publication of a special edition may be described as a normal function of a press entity. However, we do not consider distribution of a special edition at no cost to twenty times the customary circulation of the newspaper to be one of a newspaper's normal, legitimate functions—especially when the special edition does not carry the newspaper's masthead. We therefore hold that the Special Election Editions are not exempted from the reach of section 441b by the press exemption set forth in section 431(9)(B)(i).

V.

Because we conclude that the Special Election Edition falls within the ambit of section 441b, we turn to the question whether section 441b as applied to the Special Election Edition passes constitutional muster. The district court concluded that "if § 441b were intended by Congress to prohibit MCFL's ex-

penditures of printing and distributing the newsletters in question, it would be . . . violative of MCFL's freedoms of speech, press, and association."

The FEC argues that section 441b as applied to the Special Election Edition did not affect MCFL's First Amendment rights, and that the government has a substantial interest in enforcing the statute.

The starting point of our analysis must be a classification of section 441b as a content-based restriction or a regulation of the time, place, or manner of expression. In the instant case, the statute prohibits the use of corporate funds to publish newsletters "in connection with" federal elections. The FEC has no quarrel with the time, place, or manner of expression of the MCFL Special Editions; it is the political *content* of the publications which runs afoul of the statute. Therefore, section 441b must be considered a content-based restriction of expression, and may be justified only by a showing of substantial government interest. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The FEC argues that section 441b does not affect MCFL's First Amendment rights because the Act does not absolutely prohibit corporations from engaging in political advocacy. Under the statute, MCFL would be permitted to use its corporate funds to establish a voluntary, segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C) (1982). Had the Special Election Edition been produced with money from such a fund, the FEC argues, MCFL's freedom to engage in political advocacy would have been preserved. It does not appear to this court, however, that the availability of alternative methods of funding speech justifies eliminating the simplest method. Cf. *Linmark Associates v. Will-*

ingboro, 431 U.S. 85, 93-94 (1977); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974).⁷

The FEC contends that the regulation in the instant case is permissible because it is necessary to protect substantial government interests. The purposes of section 441b were set forth in *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197, 207-08 (1982):

to ensure that substantial aggregations of wealth amassed by the substantial advantages which go with the corporate form of organization should be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions The second purpose . . . is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support

⁷ Moreover, establishment of a voluntary segregated fund (political committee) requires disclosure of the names of contributors. 2 U.S.C. § 432 (1982). Under certain circumstances, this requirement may deter political activity on the part of individuals and may chill political speech on the part of the corporation. See *Buckley v. Valeo*, 424 U.S. at 74; *Federal Election Comm'n v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 423 (2d Cir. 1982) (campaign disclosure provisions endanger First Amendment rights if an organization demonstrates a pattern of threats or the existence of specific manifestations of public hostility against the organization or its members). In addition, amicus curiae the Civil Liberties Union of Massachusetts (CLUM) contends that many issue-centered organizations would be prohibited by their own by-laws from registering as political committees because of a commitment to the principle of non-partisanship. Brief of CLUM at 21.

political candidates to whom they may be opposed. (Citations omitted.)

The Court emphasized that:

the overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. Likewise, in *Buckley v. Valeo* [424 U.S.] at 26-27, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."

Id. at 208 (additional citations omitted).

In the instant case, we must observe that the foregoing government interests do not seem to be substantially implicated by MCFL's expenditures. Because MCFL did not contribute directly to a political campaign, MCFL's expenditures did not incur any political debts from legislators. Moreover, contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on

the abortion issue. That would appear to be the very purpose of the organization and the contributions to it.

The FEC contends that the instant case is controlled by *National Right to Work Committee*, 459 U.S. 197. In that case, the Supreme Court upheld the prohibition of the use of corporate funds to distribute a letter soliciting contributions for the corporation's political action fund which, in turn, contributed directly to candidates. However, the instant case, unlike *National Right to Work Committee*, involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates. See *Federal Election Commission v. National Conservative Political Action Committee*, 53 U.S.L.W. 4293, 4297 (U.S., March 18, 1985). ("NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.") The government has less interest in regulating independent expenditures than in regulating direct campaign contributions. As the Supreme Court stated in *Buckley*:

The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Buckley v. Valeo, 424 U.S. at 47.

We must conclude that the FEC has offered no substantial government interest in prohibiting MCFL's expenditures for publication of its Special Election Editions. We therefore hold that the application of section 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights. On that basis, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

OPINION

June 29, 1984

GARRITY, J.

This is an enforcement proceeding by the Federal Election Commission (FEC) seeking to invoke the provisions of § 441b of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 441b, against the defendant Massachusetts Citizens for Life, Inc. (MCFL) for having made expenditures of corporate funds¹ in connection with the 1978 elec-

¹ After the FEC brought this suit, defendant MCFL established a separate, segregated fund to be utilized for political purposes (often called a political action committee or PAC) pursuant to 2 U.S.C. § 441b(b) (2) (C), and presumably the costs of any current MCFL newsletters are borne by this PAC. However, this action has not on that account become moot, since the complaint seeks payment to the United States Treasury of a \$5,000 civil penalty.

tion of Massachusetts candidates for federal office. Jurisdiction rests upon 28 U.S.C. § 1345 and 2 U.S.C. § 437g(a)(6)(A).² Cross-motions for summary judgment were filed by the parties on a record consisting of affidavits, answers to interrogatories and a notice to admit facts and depositions. Exhaustive legal memoranda, which incidentally discussed many sub-issues and side issues and contingent issues and alternative grounds not reached in this opinion, were filed before and subsequent to oral argument.

I

The facts are essentially undisputed. The defendant is a Massachusetts corporation formed in January 1973 for the following purpose:

To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized under Chapter 180 of the general Laws of the Commonwealth of Massachusetts.

In September 1978 MCFL published an eight-page "Special Election Edition" of the MCFL newsletter

² Section 437g jurisdiction may be contrasted with that under 2 U.S.C. § 437h providing for actions to construe the constitutionality of any provision of the Federal Election Campaign Act, in which the district court immediately certifies questions of constitutionality to the Court of Appeals, which sits en banc. See *Bread Political Action Com. v. FEC*, 7 Cir. 1979, 591 F.2d 29, *Athens Lumber Co., Inc. v. FEC*, 11 Cir. 1983, 689 F.2d 1006, 1009-1011, en banc 718 F.2d 363, cert. den. 52 L.W. 3686 (March 19, 1984), and *FEC v. TRIM*, *infra*, at 49-51.

and mailed it to 58,025 persons. The defendant expended from its general treasury funds \$475 to prepare the edition, \$2100 to print it and \$6800 for mailing. Some minor errors in the voting records of three candidates were discovered and, later in the month, a revised partial edition was printed at a cost of \$492 for 20,000 copies. MCFL's total expenditure for the two printings and distributions was \$9812.

The first-page headline of the editions read, "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE". The editions listed all candidates in an upcoming September 19, 1978 primary election for Congress, state Governor and state legislature and reported their positions on three pro-life issues: a "constitutional human life amendment", legislation to prohibit the use of tax funds for abortions, and legislation to provide positive alternatives to abortion. The positions of incumbents were derived from their voting records and of non-incumbents from their answers to questionnaires. The editions urged that recipients "vote pro-life" and carried photographs only of congressional and gubernatorial candidates whose records or promises met with MCFL approval. However, the text also stated, "This special election edition does not represent an endorsement of any particular candidates" and FEC has not contended that the publication constituted express advocacy for any of the candidates.

II

Before entering the thicket of statutes and regulations governing federal elections, some preliminary observations may be in order. First, this is probably a case of first impression. To the best of our knowledge plaintiff has not heretofore sought to invoke the

provisions of § 441b against a noncommercial corporation for making expenditures in connection with either a primary or final election to federal office. Judicial interpretations of § 441b or its predecessor are found in criminal cases, e.g., *United States v. Chestnut*, S.D. N.Y. 1975, 394 F.Supp. 581, civil actions for enforcement of administrative subpoenas, e.g., *FEC v. Long Island Tax Reform Immediately Committee (TRIM)*, 2 Cir. 1980, 616 F.2d 45, or pursuant to the disclosure and reporting provisions of other sections of the Federal Election Campaign Act, e.g., *FEC v. American Federation of State, County and Municipal Employees*, D.C. D.C. 1974, 471 F.Supp. 315, or in cases concerning campaign contributions, e.g., *FEC v. National Right to Work Committee (NRWC)*, 1982, 459 U.S. 197.³ Civil penalties and contempt adjudications are among the sanctions now provided in § 437g for violations of § 441b. The complaint in the instant case seeks a civil penalty of \$5,000.

³ After the Supreme Court decision in the NRWC case, the parties filed supplemental memoranda on the question whether it is controlling precedent in this case. In our opinion, it is not. Plaintiff argues that the Supreme Court treated NRWC's solicitation of campaign contributions from non-members as the making of prohibited expenditures. We believe, however, that a fair reading of its unanimous opinion leaves no doubt that the Court was addressing the legality of NRWC's fundraising, viz., solicitation of contributions to be donated to political candidates or campaign committees, not the legality of its expenditures. See *Democratic Party v. National Conservative P.A.C.*, E.D. Pa. 1983, 578 F.Supp. 797, 820. For one thing, the opinion did not quote or even cite the statutory definitions of "expenditure", § 441b(b) (2) and § 431(f) except, at 201, in passing reference to separate segregated funds. Also, NRWC discussed only freedom of association, not freedom of speech.

Secondly, the facial constitutionality of § 441b is not an open question. The compelling government interest in preserving the integrity and appearance of integrity of federal elections that underlies the regulation of campaign contributions and expenditures has been long established, at least since *United States v. Automobile Workers*, 1957, 352 U.S. 567. The constitutionality of the FECA was explored in depth in the "watershed case" of *Buckley v. Valeo*, 1976, 424 U.S. 1, in which the opinions *per curiam* and of the individual Justices exceeded 200 pages. Likewise, the precious First Amendment interests here involved need simply to be recognized, not explicated. We subscribe to Judge Sweet's statement in *FEC v. Weinstein*, S.D. N.Y. 1978, 462 F.Supp. 243, 249:

For this court to elaborate on the nature of free speech would be presumptuous in view of the exhaustive literature in this field and the opinions already referred to.

The derivation and relationship between First Amendment freedoms and democracy's dependence upon honest and apparently honest elections have been described in numerous scholarly articles, e.g., *Corporate and Labor Union Activity in Federal Elections: "Active Electioneering" as a Constitutional Standard*, 49 Geo. Wash. L. Rev. 761 (1981), and decisions, e.g., *United States v. Chestnut*, *supra* at 588-591, *Common Cause v. Schmitt*, D.C. D.C. 1980, 512 F.Supp. 489, 493-500.

Thirdly, in ruling upon the parties' cross-motions for summary judgment we are mindful of the "basic principle that . . . If a court can decide a case on non-constitutional grounds, it should not stray into the field on constitutional analysis." *FEC v. TRIM*, *supra*

at 51-52. See also the classic exposition of this principle in *United States v. Automobile Workers*, *supra* at 590-592. This does not mean, however, that the statute can be construed without awareness of the impact of plaintiff's interpretation of § 441b on the defendant's freedoms of speech and association. First Amendment interests permeate the issues of statutory construction here presented, and Congress will not be presumed to have been insensitive to them.

III

Section 441b(b) (2) provides the applicable definition⁴ of "expenditure", as follows:

For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election. . . .

Section 441b thus outlaws indirect payments or gifts of anything of value to any candidate, campaign committee or political party or organization. Was defendant's publication of the Special Election Editions intended by Congress to be such a payment or gift? We think not. The publication was uninvited by any candidate and uncoordinated with any campaign.⁵ When competing candidates were on the same

⁴ In our opinion, this definition is exclusive despite use of the verb "shall include" rather than "shall mean" because § 431(f) (4) (H), the definition section of FECA, in effect adopts the § 441b(b) (2) definition.

⁵ "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and

side of the abortion issue, it did not suggest a preference. To the extent that it was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which, according to public opinion polls, is opposed by most citizens. It listed the positions of hundreds of candidates on a single political issue, without however expressly advocating the election or defeat of any particular candidate or belittling the importance of other election issues. The publication cost less than \$10,000 and nearly 500 candidates were surveyed, an alleged "expenditure" of about \$20 per candidate. If the space in the editions devoted to candidates for federal office be segregated from the rest, the cost of the papers was about \$4,000 for 50 candidates, or \$80 per—in either case, hardly the sort of "large" expenditures, repeatedly referred to in *Buckley v. Valeo*, *supra*, or "indirect contributions" which the 1947 amendment to the Federal Corrupt Practices Act was aimed at. See *United States v. CIO*, 1948, 335 U.S. 106, 115, 122.

IV

We also hold that the tabloids in question were not expenditures prohibited by § 441b because they were "news story, commentary, or editorial distributed through the facilities of any . . . periodical publication" and hence exempted from the definition of ex-

indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley v. Valeo*, *supra*, at 47.

penditure by the 1974 amendments to FECA, found now in 2 U.S.C. § 431(9)(B)(i) (before 1980 at § 431(f)(4)(A)).⁶ They listed the voting records of incumbents on three legislative proposals pertaining to abortions and reported the responses to questionnaires regarding these proposals received from nonincumbent candidates; and urged readers to vote pro-life. In our opinion, the compilation of voting records and questionnaire responses was news, probably not available elsewhere; and the call to vote pro-life, in conjunction, incidentally, with a quotation from Thomas Jefferson, was editorial.

The closer question is whether the special election editions were "periodical publications"⁷ within the meaning of the statutory exemption. We find that they were. First, they were similar in newsprint, sheet form, size and format to the "MCFL Newsletter" that the defendant published relatively regularly, subject only to the availability of sufficient funds, for five years before 1978. The newsletters

⁶ The complete provision is: The term "expenditure" does not include—any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. There is no claim in this case that the defendant's facilities are owned or controlled by any political party, committee or candidate.

⁷ The term is not defined elsewhere in the statute or regulations. The Commission has suggested, in accordance with FEC Advisory Opinion AO 1980-109, CCH Guide ¶ 5556, that we borrow and apply the definition of the term "bona fide newspaper" in regulations at 11 CFR § 110.13, as elaborated at 44 Fed. Reg. 76735 (12/27/79). But § 110.13 concerns the staging of political debates, which in our view presents quite different problems.

typically filled 6-10 pages of newsprint and included explanations and endorsements of its opposition to abortions, reports of political developments and judicial rulings on abortion-related issues, announcements of social activities for members and appeals for funds. Special election editions were published prior to all elections since 1974, thrice before 1978. Secondly, the legislative history of the newspaper exemption shows that Congress intended that it be a broad exemption, coextensive with the First Amendment. The relevant House of Representatives committee report, H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974), stated that

it is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press or of association. (emphasis added)

The same report indicates that the amendment would conform the statute to preexisting law, which would presumably include the *caveat* expressed in *United States v. CIO, supra*, at 123, as follows:

It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. It is unduly stretching language to say that members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests.

Another indication of the breadth of the news exemption from FECA's definition of "expenditure"

was Congress' simultaneous enactment of a narrower provision exempting newspapers from the reporting and disclosure provisions of FECA, § 437(a).⁸

V

If § 441b were intended by Congress to prohibit MCFL's expenditures of printing and distributing the newsletters in question, it would be unconstitutional under the First Amendment as applied to MCFL because violative of MCFL's freedoms of speech, press and association. Our opinion on this point is based upon the junction in this case of three distinctive features of the expenditures at issue. They were (a) independent of any candidate or party, (b) by a non-profitmaking corporation formed to advance an ideological cause and (c) for the purpose of publishing direct political speech. We discuss each in turn.

The only compelling governmental interest⁹ that would justify the application of § 441b to the defendant's Special Election Editions, to wit, the prevention of real or apparent corruption, has not been shown by plaintiff to be implicated here. The danger that the newsletters might, like large campaign contributions, "secure a political *quid pro quo* from current and potential office holders", *Buckley v. Valeo*, *supra* at 26, or create political debts, *First National Bank of Boston v. Bellotti*, *supra* at 788, fn. 26, or "pose a perceived threat of actual or potential corruption,"

⁸ This provision was invalidated as unconstitutional by the Court of Appeals decision in *Buckley v. Valeo*, D.C. Cir. 1975, 519 F.2d 821, 869-78, an aspect of the case not reviewed by the Supreme Court in its landmark decision.

⁹ "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment." *Citizens Against Rent Control v. Berkeley*, 1981, 454 U.S. 290, 296-297 (emphasis added).

California Medical Assn. v. FEC, 1981, 453 U.S. 182, concurring opinion of Blackmun, J. at 203, has not been shown. The election editions were accurate tabulations of all candidates' positions on three public issues espoused by MCFL, without express advocacy of the election of a particular candidate. The costs of their composition and distribution were made without the cooperation, consultation, request or suggestion of any candidate, see § 431(17) of the Act, and hence independent expenditures, a fact which *Buckley v. Valeo*, *supra* at 47, quoted *ante* at fn. 5, says "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (emphasis added). In our opinion, this independence under the circumstances of the instant case not merely alleviates "the danger" which is an essential predicate to curtailment of MCFL's First Amendment freedoms—it eliminates it.

Other governmental interests have sometimes been advanced in support of § 441b: to protect shareholders from having corporate funds used to support political candidates to whom they may be opposed, *FEC v. NRWC*, *supra* at 207-208, and "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Auto Workers*, *supra* at 575. It is self-evident that the expenditures at issue in this case are not contrary to these two interests. The expenditures in question clearly carry out the widely publicized purpose of MCFL's existence, viz., opposition to abortion, of which all members must be aware before sending in donations. As for promoting citizen responsibility, publication of tabloids urging readers to go to the polls and vote for candidates sharing their views on an important public issue is scarcely inconsistent with that governmental interest.

Buckley v. Valeo, *supra* at 44-48, ruled that independent expenditures are constitutionally protected if made by an individual or group "in order to engage directly in political speech." *California Medical Assn. v. FEC*, 1981, 453 U.S. 182, 195. The single differentiating factor in the instant case from *Buckley* is the defendant's corporate form. But that difference cannot be dispositive. The corporate identity of the speaker does not deprive speech of what otherwise would be its clear entitlement to protection. *First National Bank of Boston v. Bellotti*, *supra* at 778-786. The dissenting justices in that case emphasized the nature of commercial corporations. Probably they would not have dissented had the holding been limited to nonprofitmaking corporations like MCFL. This is indicated in Mr. Justice White's dissenting opinion, at 805, as follows:

It is clear that the communications of profit-making corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see *NAACP v. Button*, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. (emphasis added).

Thus the second critical element of MCFL's constitutional claims is the nature of the defendant corporation.

The third is the purpose of the expenditures the FEC seeks to forbid: the publication of direct political speech, not the solicitation of contributions from 267,000 individuals as in *FEC v. NRWC*, *supra*, nor "speech by proxy"¹⁰ by means of contributions to a political action committee as in *California Medical Assn. v. FEC*, *supra*, (such "speech by proxy" . . . is not the sort of political advocacy . . . entitled to full First Amendment protection." *Id.*, at 196. Emphasis added.) *Brown v. Hartlage*, 1982, 456 U.S. 45, held the Kentucky Corrupt Practices Act unconstitutional as applied to a candidate for public office who made a campaign promise to serve if elected at a salary less than that fixed by law, finding, at 56-57, "that the statements of petitioner Brown . . . were very different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment." (emphasis added). Similarly here, the defendant's special election editions were the very antithesis of a corrupting agreement or contribution. They were open, strived for accuracy, reported on every candidate regardless of prospects of election and urged readers to vote on election day. They sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue. Far from being an improper influence, or eroding public confidence in the electoral process,

¹⁰ "[T]his attenuated form of speech does not resemble the direct political advocacy to which this Court in *Buckley* accorded substantial constitutional protection." *California Medical Assn. v. FEC*, *supra*, fn. 16 at 196.

or threatening its integrity, *FEC v. NRWC, supra* at 207-208, they would seem to promote rather than undermine the honest functioning of representative government.

Conclusion

In their briefs and oral arguments the parties have addressed in many ways but always indirectly an issue of characterization that we feel is best stated explicitly: in publishing its Special Election Editions in 1978, was the defendant spending or speaking? Plaintiff would answer the former and defendant would answer the latter. Both would, of course, be correct, but only partially so. Essentially, however, we agree with the defendant that the costs of the publications in question are more accurately characterized as speaking than spending and that in placing the FCPA in the FECA as new § 441b Congress did not intend to proscribe the type of expenditure made by the defendant in 1978.

Alternatively, and conditionally upon our having misinterpreted § 441b and § 431(9)(B)(i), we have observed the precept, "regulation of First Amendment rights is always subject to exacting judicial scrutiny", *Citizens Against Rent Control v. Berkeley, supra* at 298, and found that to apply the Federal Corrupt Practices Act, 2 U.S.C. § 441b, to defendant MCFL's 1978 Special Election Editions would violate its rights to freedom of speech, press and association under the First Amendment of the United States Constitution. Accordingly it is ordered that plaintiff's motion for summary judgment be denied and that defendant's motion be granted and that judgment be entered for the defendant dismissing the complaint.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: July 31, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

By Richard W. Gordon
Chief Deputy Clerk.

[cc: Messrs. Bader, Fox, O'Connell, Heins,
Featherstone and Alviani]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

NOTICE OF APPEAL

[Filed Aug. 28, 1985]

The appellant Federal Election Commission hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the First Circuit, entered on July 31, 1985, finding 2 U.S.C. § 441b to be unconstitutional as applied to appellees.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Assistant General Counsel

/s/ Carol A. Laham
CAROL A. LAHAM
Attorney

FOR THE APPELLANT
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463

August 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 84-1719

Certificate of Service

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

CERTIFICATE OF SERVICE

I certify that I have caused to be served, by first-class mail postage prepaid, a copy of the Federal Election Commission's Notice of Appeal in the above-captioned case on this 22nd day of August, 1985, on the following counsel at the addresses set forth below:

Francis Fox
Bingham, Dana & Gould
100 Federal Street
Boston, Massachusetts 02110

Joseph D. Alviani
New England Legal Foundation
55 Union Street
Boston, Massachusetts 02110

James J. Featherstone
Santarelli and Bond
2033 M Street, N.W.
Washington, D.C. 20036

Marjorie Heins
 Massachusetts Civil Liberties
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 47 Winter Street
 Boston, Massachusetts 02108

Jane E. Kirtley
 The Reporters Committee For
 Freedom of the Press
 800 18th Street, N.W.
 Washington, D.C. 20006

James O'Connel
 Sally, O'Connel & Fitch
 33 Union Street
 Boston, Massachusetts 02108

/s/ Carol A. Laham
 CAROL A. LAHAM

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

GARRITY, D. J.

FEDERAL ELECTION COMMISSION,
 1325 K Street, N.W.,
 Washington, D.C. 20463, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
 313 Washington Street,
 Newton, Massachusetts, DEFENDANT.

COMPLAINT

JURISDICTION

1. Jurisdiction of this court is invoked under 28 U.S.C. § 1345 as an action commenced by an agency of the United States expressly authorized to sue by an act of Congress. This action is instituted pursuant to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.*, (hereinafter the "Act" or "FECA") which provides that the Federal Election Commission may institute a civil action for relief (including an order for a civil penalty) in the district Court of the United States in which the person against whom such action is brought resides or transacts business. 2 U.S.C. § 437g(a)(6). The Act also provides that any such action brought before the district court shall be advanced on the docket of the

court and put ahead of other actions. 2 U.S.C. § 437g(a)(10).

PARTIES

2. Plaintiff, Federal Election Commission (hereinafter the "Commission") is the independent agency of the United States vested with exclusive jurisdiction for civil enforcement of the Act. 2 U.S.C. §§ 437c(b)(1), 437d(a)(6) and 437d(e).

3. Defendant Massachusetts Citizens for Life, Inc., (hereinafter "MCFL") is a non-profit corporation registered under the laws of the state of Massachusetts and lists its address as 313 Washington Street, Newton, Massachusetts.

FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED

4. 2 U.S.C. § 441b(a) prohibits any corporation whatever from making contributions or expenditures in connection with any federal election.

5. 2 U.S.C. § 441b(b)(2) defines expenditure as "any direct or indirect payment, distribution, loan, advance, deposit or gift or money, or any services, or anything of value. . . to any candidate, campaign committee or political organization, in connection with any [federal] election. . ."

6. 2 U.S.C. § 441b(b)(2)(C) excludes from the definition of expenditure "the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative or corporation without corporate stock."

7. 2 U.S.C. § 431(9)(B)(iii) excludes from the definition of expenditure "any communication by any

membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office. . ."

STATEMENT OF CLAIM

8. In September 1978, MCFL prepared, printed and distributed to the general public copies of a flyer entitled "Special Election Edition" (see Exhibit 1 attached.)

9. The "Special Election Edition" identified candidates for the 1978 federal elections, stated their positions on abortion issues and exhorted the reader to vote for those candidates who were opposed to abortion.

10. The "Special Election Edition" was mailed to 58,025 persons, at least 50,000 of whom were not members of MCFL.

11. MCFL expended \$475.00 to prepare, \$2,113.75 to print and \$6,842.01 to mail the "Special Election Edition" to recipients.

12. In September 1978, 20,000 copies of four pages of the "Special Election Edition" were prepared, printed and distributed to the general public under the title, "Special Election Edition—Complimentary Partial Copy" (see Exhibit 2 attached).

13. The "Special Election Edition—Complimentary Partial copy" identified candidates for the 1978 federal elections, stated their positions on abortion issues and exhorted the reader to vote for those candidates who were opposed to abortion.

14. MCFL expended \$492.00 to print the "Special Election Edition Partial Complimentary Copy."

15. MCFL expended a total of \$9,812.76 to prepare, print and distribute the "Special Election Edition" and the "Special Election Edition—Complimentary Partial Copy." Approximately one-half of the expenditures for the "Special Election Edition" and all of the expenditures for the "Special Election Edition Complimentary Partial Copy," a total of over \$4,000, were made in connection with a federal election and violated 2 U.S.C. § 441b(a).

16. On the basis of a complaint filed with the Commission on May 1, 1979, the Commission determined on June 27, 1979, that there was reason to believe that MCFL violated 2 U.S.C. § 441b(a) by the expenditures made in connection with a federal election described in paragraph 15. Also on June 27, 1979, the Commission initiated an investigation into this matter. 2 U.S.C. § 437g(a)(2).

17. Pursuant to 2 U.S.C. § 437g(a)(5)(A), (amended in 1979 by Pub. L. No. 96-187, 93 Stat. 1339), the Commission, on December 20, 1979, found reasonable cause to believe that MCFL violated 2 U.S.C. § 441b(a) and notified MCFL of this finding.

18. After the failure of repeated efforts at conference, conciliation and persuasion, the Commission on October 21, 1980, found probable cause to believe that MCFL violated 2 U.S.C. § 441b(a). Accordingly, MCFL was sent notification of this finding. 2 U.S.C. § 437g(a)(4)(A).

19. After finding probable cause to believe that MCFL committed a violation of 2 U.S.C. § 441b by the expenditures made in connection with the 1978 federal elections described in paragraph 14, the Commission again attempted to conciliate this matter with MCFL. 2 U.S.C. § 437g(a)(4)(A).

20. The Commission, being unable to agree with MCFL upon terms for a mutually acceptable con-

ciliation within the statutorily prescribed time limit, authorized the Office of General Counsel to file a civil suit in the United States District Court for relief in this matter. 2 U.S.C. § 437g(a)(6).

WHEREFORE, plaintiff, Federal Election Commission prays that this court:

(1) find the Massachusetts Citizens for Life, Inc. violated 2 U.S.C. § 441b(a) by making expenditures in connection with a federal election to prepare, print and distribute the "Special Election Edition" and the "Special Election Edition—Complimentary Partial Copy";

(2) order Massachusetts Citizens for Life, Inc., to pay a civil penalty of \$5,000 to the United States Treasury.

(3) order such other and further relief as the court deems appropriate.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

/s/ R. Lee Andersen
R. LEE ANDERSEN
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-5071

[Exhibits 1 and 2 have been lodged with the Court]

APPENDIX F

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of
Federal Campaign Funds

§ 431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b (b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of \$5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of \$5,000 during a calendar year, or makes contributions aggregating in excess of \$1,000 during a calendar year.

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of

money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include—

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advo-

cacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed \$2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply

with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(vii) the payment of compensation for legal or accounting services—

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26,

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the

costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided, That—*

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided, That—*

(1) such payments are not for the costs of campaign materials or activities used in connection with

any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

§ 432. Organization of political committees

(a) *Treasurer; vacancy; official authorizations.* Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) *Account of contributions; segregated funds.*

(1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess

of \$50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall—

(A) if the amount of the contribution is \$50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess of \$50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) all funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) *Recordkeeping.* The treasurer of a political committee shall keep an account of—

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of \$50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than \$200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with

the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or cancelled check for each disbursement in excess of \$200.

(d) *Preservation of records and copies of reports.* The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for 3 years after the report is filed.

(e) *Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.*

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1) of this section.

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for

use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3) (A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that—

(i) the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of account with respect to its function as a principal campaign committee; and

(ii) candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of \$1,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is

not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 441b(b) shall include the name of its connected organization.

(f) *Filing with and receipt of designations, statements, and reports by principal campaign committees.*

(1) Notwithstanding any other provision of this Act, each designation, statement, or report of receipts or disbursements made by an authorized committee of a candidate shall be filed with the candidate's principal campaign committee.

(2) Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act.

(g) *Filing with and receipt of designations, statements, and reports by Clerk of House of Representatives or Secretary of Senate; forwarding to Commission; filing requirements with Commission; public inspection and preservation of designations, etc.*

(1) Designations, statements, and reports required to be filed under this Act by a candidate or by an authorized committee of a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress, and by the principal campaign committee of such a candidate, shall be filed with the Clerk of the House of Representatives, who shall receive such design-

nations, statements, and reports as custodian for the Commission.

(2) Designations, statements, and reports required to be filed under this Act by a candidate for the office of Senator, and by the principal campaign committee of such candidate, shall be filed with the Secretary of the Senate, who shall receive such designations, statements, and reports, as custodian for the Commission.

(3) The Clerk of the House of Representatives and the Secretary of the Senate shall forward a copy of any designation, statement, or report filed with them under this subsection to the Commission as soon as possible (but no later than 2 working days) after receiving such designation, statement, or report.

(4) All designations, statements, and reports required to be filed under this Act, except designations, statements, and reports filed in accordance with paragraphs (1) and (2), shall be filed with the Commission.

(5) The Clerk of the House of Representatives and the Secretary of the Senate shall make the designations, statements, and reports received under this subsection available for public inspection and copying in the same manner as the Commission under section 438(a)(4), and shall preserve such designations, statements, and reports in the same manner as the Commission under section 438(a)(5).

(h) *Campaign depositories; designations, maintenance of accounts, etc.; petty cash fund for disbursements; record of disbursements.*

(1) Each political committee shall designate one or more State banks, federally chartered de-

pository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account and such other accounts as the committee determines at a depository designated by such committee. All receipts received by such committee shall be deposited in such accounts. No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except by check drawn on such accounts in accordance with this section.

(2) A political committee may maintain a petty cash fund for disbursements not in excess of \$100 to any person in connection with a single purchase or transaction. A record of all petty cash disbursements shall be maintained in accordance with subsection (c)(5) of this section.

(i) When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

§ 433. Registration of political committees

(a) *Statements of organization.* Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1). Each separate segre-

gated fund established under the provisions of section 441b(b) shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4).

(b) *Contents of statements.* The statement of organization of a political committee shall include—

- (1) the name, address, and type of committee;
- (2) the name, address, relationship, and type of any connected organization or affiliated committee;
- (3) the name, address, and position of the custodian of books and accounts of the committee;
- (4) the name and address of the treasurer of the committee;
- (5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and
- (6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) *Change of information in statements.* Any change in information previously submitted in a statement of organization shall be reported in accordance with section 432(g) no later than 10 days after the date of the change.

(d) *Termination, etc., requirements and authorities.*

- (1) A political committee may terminate only when such a committee files a written statement, in accordance with section 432(g), that it will no longer receive any contributions or make any disbursement and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for—

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

§ 434. Reporting requirements

(a) *Receipts and disbursements by treasurers of political committees; filing requirements.*

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

- (i) a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candi-

date is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the following reports shall be filed:

(i) a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31; and

(ii) a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating \$100,000 or made expenditures aggregating \$100,000 or anticipates receiving contributions aggregating \$100,000 or more or making expenditures aggregating \$100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2) (A) (i), a post-general election report shall be filed in accordance with paragraph (2) (A) (ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2) (A) (i), a post-general election report in accordance with paragraph (2) (A) (ii), and quarterly reports in accordance with paragraph (2) (A) (iii); and

(iii) if at any time during the election year a committee filing under

paragraph (3)(A)(ii) receives contributions in excess of \$100,000 or makes expenditures in excess of \$100,000, the treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either—

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either—

(A)(i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before

(or posted by registered or certified mail no later than the 15th day before) any election in which the committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) is sent by registered or certified mail, the United States postmark shall be considered the date of filing of the designation, report, or statement.

(6)(A) The principal campaign committee of a candidate shall notify the Clerk, the Secretary, or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of \$1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i),

or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(b) *Contents of reports.* Each report under this section shall disclose—

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and calendar year, the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of title 26;

(3) the identification of each—

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year, or in

any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of \$200 within the calendar year, together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee—

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 441a(d) of this title; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, dis-

bursments not subject to the limitation of section 441a(b);

(5) the name and address of each—

(A) person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3) (A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has

received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of an such disbursement;

(B) for any other political committee, the name and address of each—

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount or any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of \$200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty or perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any au-

thorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 441a(d) of this title, together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in excess of \$200 within the calendar year from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year; and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement containing the information required under subsection (b) (3) (A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a) (2) of this section, and shall include—

(A) the information required by subsection (b) (6) (B) (iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of \$200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Any independent expenditure (including those described in subsection (b) (6) (B) (iii) of this section) aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after

such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State shall contain the information required by subsection (b) (6) (B) (iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b) (6) (B) (iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political

committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of \$50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

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No. 85-701.

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1985.

FEDERAL ELECTION COMMISSION,
APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

Motion to Affirm.

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Questions Presented.¹

Whether the Court of Appeals correctly held that § 441b is unconstitutional as applied to a nonprofit ideological corporation making indirect uncoordinated expenditures to express its views on candidates?

¹ If the Court determines that this case is not appropriate for summary affirmance and sets it down for oral argument, MCFL intends to raise and brief the following additional statutory and constitutional issues:

1. Whether 2 U.S.C. § 441b prohibits the independent uncoordinated expenditures made by MCFL since § 441b(b)(2) defines those expenditures which are prohibited and that section only includes expenditures made directly or indirectly to a candidate or campaign committee?

2. Whether § 441b prohibits MCFL's expenditures since it may only constitutionally prohibit "express advocacy" and the MCFL newsletter did not contain any express advocacy? (MCFL disagrees with the Court of Appeals' characterization in its holding that its expenditures were to "express its views on candidates").

3. Whether MCFL's newsletter is exempt from § 441b's prohibition because it is a newsletter or periodical publication within the meaning of the Federal Election Campaign Act?

4. Whether § 441b abridges MCFL's right to equal protection of the laws because it impermissibly regulates the subject of expression and the identity of the speaker?

5. Whether the phrases "in connection with," "for the purpose of influencing," and "newspaper" contained in § 441b are unconstitutionally vague?

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No. 85-701.

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1985.

FEDERAL ELECTION COMMISSION,
APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

Motion to Affirm.

Appellee Massachusetts Citizens for Life, Inc. ("MCFL"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Court of Appeals for the First Circuit be affirmed on the grounds that the questions are so insubstantial as not to warrant further argument.

Statement of the Case.

This is an appeal from the final judgment and decree entered on July 31, 1985, by the Court of Appeals for the First Circuit, finding 2 U.S.C. § 441b, which prohibits corporations and labor unions from making contributions and expenditures in connection with a federal election, unconstitutional as applied to a nonprofit ideological corporation making independent uncoordinated expenditures to publish its views on candidates (A. 24a).

MCFL is an ideological, grass roots, nonpartisan corporation organized to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity (A. 3a). It was incorporated in 1973 as a nonprofit, nonstock corporation under Massachusetts law (A. 3a, 26a). Since its incorporation, MCFL has engaged in a wide variety of activities designed to foster respect for human life and defend the right to life, including educational activities and drafting of legislation on pro-life issues.² MCFL uses various methods of raising funds, such as bake sales and dances, to support its activities. MCFL does not accept contributions from business corporations.

The primary avenue of communication among MCFL and its members³ is the MCFL newsletter. From the outset, MCFL and its members have recognized the necessity of building a strong base to achieve their goals; the newsletter is the primary vehicle in that effort. The first edition of the newsletter was published in the month that MCFL was incorporated. There-

² This fact and a number of others cited herein are derived from the record in the Court of Appeals which has not yet been transmitted to this Court.

³ The word "members" as used herein is not limited to "members" as that word is used in the Federal Election Campaign Act and defined by this Court in *Federal Election Commission v. National Right To Work Committee*, 459 U.S. 197 (1982).

after, the newsletter has been distributed fairly regularly, subject only to the availability of funds (A. 32a).

The expense of the newsletter, which is prepared primarily by MCFL members, is paid for by MCFL. The newsletter is typically 6 to 10 pages in length and is devoted to current news concerning abortion and other pro-life issues (A. 33a). It also contains information on MCFL activities and appeals for volunteers and contributions. *Id.* Material on political, administrative, judicial and legislative developments is also included. *Id.* These reports are usually coupled with appeals urging MCFL members to write or call the decision-makers and voice their support of the pro-life position.

In periods prior to elections, MCFL regularly printed "Special Election Editions" of the MCFL newspaper. Three such editions were printed before September, 1978. In September, 1978, MCFL published and distributed two editions of its newsletter, a Special Election Edition and a complimentary partial Special Election Edition, to inform its members of the position on pro-life issues of candidates in an upcoming primary election (A. 26a-27a).

The Special Election Edition referred to 50 candidates for federal office and 442 candidates for state office. It accurately reported the position of *every* candidate on three central pro-life issues.⁴ The positions of the incumbents were determined by roll call votes; the positions of the nonincumbents by responses to MCFL questionnaires (A. 27a). The publication was an educational service for concerned voters; it did not endorse any particular candidate. The newsletter states that the "[MCFL]

⁴ MCFL is just one of a number of nonpartisan organizations, including Public Citizen, The United Church of Christ, the American Civil Liberties Union ("ACLU") and the John Birch Society, which disseminate voting records. A § 441b prohibition of these publications, which constitute traditional nonpartisan speech, would chill the activities of such organizations.

election survey is an educational service to help you cast an informed vote when you go to the polls. . . ."

Shortly thereafter, MCFL printed and distributed a complimentary partial "Special Election Edition" of the MCFL newsletter for the sole purpose of correcting minor errors in the earlier full edition's reporting of the voting records of Congressmen Tsongas, Studds and Drinan. *Id.*

No arrangements were made with any candidates, campaign workers or political committees to coordinate or prearrange the preparation of the newsletter (A. 30a-31a). Both editions specifically state that "[t]his special election edition does not represent an endorsement of any particular candidate." (A. 27a.) The total cost of preparing, printing and distributing both editions was \$9,812.00. *Id.* This cost was entirely borne by MCFL. No candidate, political or campaign committee, and no corporation contributed any money towards any of the costs of preparing, printing or distributing the Special Election Editions.

On March 4, 1982, the Federal Election Commission ("FEC") instituted an action under the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), as amended, 2 U.S.C. §§ 431 *et seq.*, alleging that in publishing and distributing the newsletters, MCFL violated 2 U.S.C. § 441b which prohibits corporations from making contributions or expenditures to a candidate in connection with a federal election.

The district court below, on cross motions for summary judgment, entered judgment for MCFL (A. 25a-38a). It found that MCFL's publication of the Special Election Editions was not an expenditure under § 441b because it was not an indirect payment to any candidate, and, on independent grounds, because it did not expressly advocate the election or defeat of any candidate (A. 30a-31a). The court further held that the newsletter met the newspaper exception (A. 31a-34a). Finally, the court held in the alternative, that if § 441b applied to

MCFL's activities, it was an unconstitutional abridgement of MCFL's rights to freedom of speech, press and association (A. 38a). The Court of Appeals for the First Circuit upheld the district court's decision solely on the grounds that the statute was unconstitutional as applied to a nonprofit ideological corporation making indirect, uncoordinated expenditures to express its views of candidates (A. 19a-24a).

On August 22, 1985, the FEC filed its Notice of Appeal of that decision, pursuant to 28 U.S.C. §§ 1252 and 2101(a).

Argument.

THE COURT OF APPEALS CORRECTLY HELD THAT § 441b IS UNCONSTITUTIONAL AS APPLIED TO A NONPROFIT IDEOLOGICAL CORPORATION MAKING INDEPENDENT EXPENDITURES.

The decisions of this Court point to the inescapable conclusion that if indeed MCFL's expenditures are prohibited by § 441b, that section is unconstitutional as applied to a nonprofit ideological corporation making independent expenditures to publish truthful voting records and positions of candidates on a public issue.⁵ Thus, the Court of Appeals decision should be affirmed without further briefing or argument in this Court.

⁵Since *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a number of commentators have concluded that to the extent that § 441b is construed to prohibit independent expenditures by any corporation, it is unconstitutional. See, e.g., Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373 (1981); Nicholson, *The Constitutionality of Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 Cornell L. Rev. 945 (1980); Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti*, 28 Am. U.L. Rev. 149 (1979); *First National Bank of Boston v. Bellotti-Money Talks: Constitutional Protection of*

A review of this Court's election law cases establishes certain fundamental propositions and provides a framework for analyzing § 441b. No discussion of the interface of election law and the First Amendment could be undertaken without reference to the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* was a challenge to certain of the contribution and expenditure limits contained in the Federal Election Campaign Act of 1971, as amended in 1974. This Court held that only the governmental interest in preventing corruption may sustain contribution or expenditure limitations, both of which restrict First Amendment guarantees of freedom of speech and association. *Id.* at 26. Also, independent expenditures, however large and however effective, enjoy a highly protected status because they have at most a tenuous potential for causing corruption. *Id.* at 22-23. Therefore, no limit on individual independent expenditures was allowable under *Buckley*.

Two years after *Buckley*, the Court struck down a state criminal statute which prevented banks and business corporations from spending money to publicize their views in opposition to a referendum issue in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court held that the corporate status of the speaker does not deprive speech of its protection under the First Amendment. Even several of the dissenting justices in *Bellotti* indicated that where the corporation is the nonprofit outgrowth of individuals having joined together to advocate their common views, the corporate status of the speaker, far from *depriving* speech of an otherwise protected status, if anything *increases* the degree of protection to be accorded because the corporation enhances and secures

Corporate Speech, 8 Cap. U.L. Rev. 575 (1979); Note, *Corporate Free Speech: First National Bank of Boston v. Bellotti*, 20 B.C.L. Rev. 1003 (1979); *First National Bank v. Bellotti: The Constitutionality of Government Restrictions on Political Spending by Corporations*, 16 Hous. L. Rev. 195, 208 (1978).

the rights of its individual constituents. *Id.* at 805 (White, J., dissenting, Brennan, J. and Marshall, J., joining).

In *Federal Election Commission v. National Right To Work Committee* (NRWC), 459 U.S. 197 (1982), the Court held only that a provision of the Federal Election Campaign Act dealing with the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. NRWC had challenged the limitation imposed on a nonstock corporation restricting solicitation of contributions for a segregated fund set up for the particular purpose of contributing to candidates solely to members of the corporation. The limitation on solicitation was upheld because of the constitutional validity of legislative regulation of corporate contributions to candidates for public office. *Id.* at 208-210. Neither solicitation nor contributions are at issue here.

Finally, just this year, the Court rendered its opinion in *Federal Election Commission v. National Conservative Political Action Committee* (NCPAC), 53 U.S.L.W. 4293 (U.S., March 18, 1985). In *NCPAC*, limits on independent expenditures by an incorporated political action committee were held to violate the First Amendment. The Court reaffirmed the conclusion in *Buckley* that independent expenditures have no potential for a corrupting influence since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 4298.

In sum, these decisions establish certain fundamental propositions: (i) only the governmental interest in preventing corruption or the appearance of corruption may sustain contribution or expenditure limitations, both of which restrict fundamental First Amendment guarantees of freedom of speech and association; (ii) independent expenditures, however large and however effective, enjoy a highly protected status because they

have no or, at most, a tenuous potential for causing corruption; (iii) the corporate status of the speaker does not deprive speech of its protection under the First Amendment and; (iv) where the corporation is the outgrowth of individuals having joined together to advocate their common views, the corporate status of the speaker increases the degree of protection to be accorded because the corporation enhances and secures the associational and speech rights of its individual constituents.

Against this backdrop of decisions the First Circuit rendered its opinion in this case. The principles of those cases compel its affirmance.

A. *If § 441b is Interpreted to Prohibit the Publication and Distribution of MCFL's Newspaper, It Impinges on the Right of MCFL and its Members to Freedom of Speech, Press and Association.*

It is beyond cavil that § 441b impinges on First Amendment rights. The section intrudes upon MCFL's and its members' freedom of speech by prohibiting MCFL from publishing a newsletter giving voters accurate, nonpartisan information on the stance of candidates for office on an issue of importance to its members.⁶ Discussion of public issues and political campaigns is at the heart of the American Constitution and the First Amendment. See *Buckley v. Valeo*, 424 U.S. 1, 48, 52-53 (1976). Section 441b is an impermissible content-based regula-

⁶ Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

Buckley v. Valeo, 519 F.2d 821, 875 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) (per curiam).

tion. As the Court of Appeals noted, "it is the political content which runs afoul of the statute (emphasis in original)." (A. 20a.) Moreover, prohibiting MCFL from publishing its newsletter violates the guaranty of freedom of the press, a guaranty which is not limited to traditional newspapers. *Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972), citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

MCFL's and its members' associational rights are also violated by such a prohibition. This Court has recognized "freedom of association" as one of the rights derived from the First Amendment's guarantees of speech, press, petition and assembly. L. Tribe, *American Constitutional Law*, § 12-23 at 702 (1978). The right of association is most sacrosanct where a group or its members are engaging in the advancement of beliefs and ideas, however controversial. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981). The government cannot interfere with an activity integral to an association in such a way that the association's protected purposes would be significantly frustrated were the activity disallowed. See, e.g., *Healy v. James*, 408 U.S. 169 (1972). MCFL's newsletter is such an integral activity. Expenditure limits particularly impinge on associational rights because any limitation on independent expenditures "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley v. Valeo*, 424 U.S. at 22 (citations omitted). Such limitations impinge on associational rights because they strike at the very reason that individuals have joined together. Since limits on expenditures have been found to violate an organization's associational rights, see, e.g., *FEC v. NCPAC*, 53 U.S.L.W. at 4297, clearly, the total prohibition upon any expenditure by MCFL simply because it has chosen to associate in a corporate form undercuts its and its members' right of association.

The FEC argues that § 441b does not restrict political speech because MCFL could have published its newsletter, as long as it financed the activity through a separate segregated fund. Jurisdictional Statement, p. 10. This disingenuous statement is rebutted by the FEC's own argument in the district court below. The FEC, citing *FEC v. NRWC*, argued that it was entitled to summary judgment because MCFL had distributed the newsletter beyond its membership since, being a non-membership corporation, it had no members as that term is defined in the Federal Election Campaign Act. Accepting the FEC's contentions at face value, MCFL would have been permitted to set up a separate segregated fund, but would have been prohibited from soliciting any contributions to the fund.⁷ See *FEC v. NRWC*, 459 U.S. at 205-206. The Court in *Buckley* stated:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. *The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs.*

Buckley v. Valeo, 424 U.S. at 19 (emphasis added) (footnote omitted.) That comment is particularly apt in this case. Obvi-

⁷ To paraphrase the Court's comment in *Buckley*, 424 U.S. at 19 n.18, being free to engage in unlimited political expression while subject to the FEC's restrictions is like being free to drive an automobile as far and as often as one desires on an empty gas tank.

ously, § 441b does restrict political speech by MCFL, in addition to restricting MCFL's press and associational rights.

Moreover, requiring an ideological corporation to use a separate segregated fund, more commonly referred to as a Political Action Committee ("PAC"), to carry out its political advocacy presents particular problems and may chill the corporation's speech.⁸ That route is unavailable to nonstock corporations which lack members, as that term is used in FECA. Further, FECA imposes burdensome procedural, administrative and recordkeeping requirements on PACs, see 11 C.F.R. Part 114, which an ideological corporation with limited funds may find too difficult or expensive to undertake and so, instead, may choose not to bother. Additionally, FECA requires PAC's to disclose the names of contributors. 2 U.S.C. § 434(b)(2). As the Court of Appeals found, in an area of sensitive First Amendment rights, mere disclosure may be sufficient to deter political activities. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 420 (1982), cert. denied, 459 U.S. 1145 (1983). A majority of the population disagrees with the stand taken by MCFL (A. 31a). If so, contributors might well be slow to contribute if their names would be disclosed.

B. Section 441b Does Not Serve a Sufficiently Compelling State Interest to Justify the Substantial Restriction on the First Amendment Rights of MCFL and its Members.

A number of related factors lead to the inescapable conclusion that § 441b does not serve a sufficiently compelling state

⁸ The FEC makes some point of the fact that MCFL later established a separate segregated fund. MCFL objected below, in its reply brief, to any reference to this under Fed. R. Evid. 407. The district court, entering judgment for defendant, did not rule on this question and MCFL insists again that reference to the fact is improper and irrelevant. In any event, the segregated fund was only created after the *in terrorem* effect of enforcement proceedings by the FEC and was possible only after MCFL's articles of organization and bylaws had been amended to create membership categories. Thus, the organization creating the PAC was a different type of corporation than the one sued by the FEC.

interest to justify the substantial restriction on the First Amendment rights of MCFL. Truly independent expenditures have scant potential for corrupting elected representatives. Moreover, if the danger of corruption exists at all, in the case, for example, of multi-million dollar, multi-national conglomerates, it does not exist in the case of grass roots, nonpartisan, nonprofit, issue-oriented corporations such as MCFL, where the independent expenditures sought to be proscribed are minimal and went toward the publication and dissemination of accurate voting records and candidates' positions on issues of concern to a large number of voters.

Buckley and its progeny establish that the only governmental interest which the government may properly invoke to justify regulation of campaign expenditures or contributions is the interest in minimizing corruption or the appearance of corruption. *Buckley v. Valeo*, 424 U.S. at 47. The "corruption" to be avoided arises when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *FEC v. NCPAC*, 53 U.S.L.W. at 4298. The FEC claims that because of MCFL's corporate structure, its independent expenditures have the potential to be corrupting; "[b]ut precisely what the 'corruption' may consist of we are never told with assurance." *Id.*

The fact that MCFL's expenditures were independent since the newsletter was created and distributed without the cooperation, consultation, request or suggestion of any candidate, "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley v. Valeo*, 424 U.S. at 47. Additionally, since the editions accurately displayed the positions on specific public issues of all candidates, there was no likelihood of the creation of political debts. *First National Bank of Boston v. Bellotti*, 435 U.S. at 788.

Even assuming *arguendo* there is a potential for a corrupting influence from large independent expenditures by business corporations, that danger simply does not exist in the context of minimal expenditures by grass roots, nonpartisan, nonprofit, ideological organizations such as MCFL. MCFL did not have access to vast sums. Even if some ideological corporations could raise substantial sums, the expenditure of such sums would not distort the political process. Moneys spent by MCFL are moneys given or raised by individuals who believe in and advocate the cause espoused by MCFL. The candidate will be no more indebted to the organization, MCFL, than to the elements of his constituency whose interests are voiced by that organization. Cf., e.g., *Common Cause v. Schmitt*, 512 F. Supp. 489, 498 (D.D.C. 1980), *aff'd*, 455 U.S. 129 (1982). Thus, even if the possibility exists that MCFL's independent expenditures would influence the representative decision-maker, there is no possibility that they would *improperly* influence him.

MCFL was engaging in direct political speech, "not the solicitation of contributions from 267,000 individuals as in *FEC v. NRWC*," 459 U.S. 197, "nor 'speech by proxy'," *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 n.16 (1981). (A. 37a.) The district court below stated:

the defendant's special election editions were the very antithesis of a corrupting agreement or contribution. They were open, strived for accuracy, reported on every candidate regardless of prospects of election and urged readers to vote on election day. They sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue. Far from being an improper influence, or eroding public confidence in the electoral process, or threatening

its integrity, *FEC v. NRWC*, *supra* at 207-208, they would seem to promote rather than undermine the honest functioning of representative government.

(A. 37a.)

Additionally, as was pointed out in *Buckley*, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley v. Valeo*, 424 U.S. at 47. Since a majority of the population does not agree with MCFL's anti-abortion stance, "[t]o the extent [the newsletter] was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospect of election of candidates subscribing to defendants' [sic] platform. . ." (A. 31a.)"

In view of the fact that MCFL's expenditures could in no way lead to real or apparent corruption, the Court of Appeals correctly concluded that the necessary element to uphold the application of the prohibition was missing.

The second reason the FEC advances as supporting the prohibition of MCFL's political speech is protection for con-

⁹ Note, contrary to the FEC's argument, *FEC v. NRWC*, 459 U.S. 197, does not govern this case. The Court of Appeals rejected such an argument stating,

the instant case, unlike *National Right to Work Committee*, involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates. See *Federal Election Commission v. National Conservative Political Action Committee*, 53 U.S.L.W. 4293, 4296 (U.S. March 18, 1985). ('NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.').

(A. 23a.)

tributors to MCFL from having their contributions "used to support political candidates to whom they may be opposed." Jurisdictional Statement at 17-18.¹⁰ This concern is not relevant in the present case. As the Court of Appeals stressed,

contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditure for a publication that informs contributors and others of the position of various candidates on the abortion issue.

(A. 22a-23a.)

The government's concern that MCFL's publication of the Special Election Edition may go against the desires of some of its contributors to vote on the basis of party loyalty or to vote for non-supporters of pro-life issues is misplaced. MCFL merely provides an informational service. In fact, MCFL began publishing the Special Election Editions, in part, because of requests from its members. With the information MCFL provides, MCFL members can decide to vote for candidates on whatever criteria they choose. MCFL members may utilize the information to vote solely for pro-life candidates or, if they choose, they can vote for candidates based on their positions

¹⁰ Once again, the FEC makes the specious argument that "[i]f all of MCFL's contributors were willing to support its political expenditures, as the court believes, MCFL would have no more trouble obtaining contributions to its separate segregated fund than to its corporate treasury." Jurisdictional Statement at 19. Since MCFL could not have solicited contributions to such a fund, as previously discussed, it would have been impossible for it to finance the preparation, printing and distribution of the Special Election Editions.

on other issues or party affiliation. Without MCFL's publication, its members are *less informed*. If anything, MCFL's publication of candidates' positions on pro-life issues guarantees its members "the opportunity to make a personal decision about the political options he or she will support." Jurisdictional Statement at 18 (citations omitted).

Another interest which the government raises in support of a prohibition on independent expenditures is public disclosure of sources of federal campaign financing. MCFL remains subject to the same disclosure provisions which govern other advocacy organizations which are not political committees. *See, e.g., 2 U.S.C. § 434(c)*.

Grasping at a final straw, the FEC argues that business corporations will be able to evade § 441b merely by contributing to ideological corporations. First, that argument is inapplicable because MCFL accepted no corporate contributions. In any event, the FEC's argument is extremely puzzling. Since § 441b continues, under the FEC's construction of the statute, to prohibit corporate business contributions and expenditures "in connection with any election," contributions by business corporations to ideological corporations to enable the ideological corporations to make expenditures in connection with an election undoubtedly would be deemed by the FEC to violate that provision. And, in the final analysis, if it is constitutional for the government to prohibit business corporations from making independent expenditures, a point which MCFL does not concede, there are certainly other, more narrowly tailored methods of preventing such expenditures which do not trample on the First Amendment rights of nonprofit ideological corporations.

In conclusion, § 441b fails to afford the "breathing space" which First Amendment freedoms need to survive. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). It is a sad commentary that even now, in the last two decades of the twentieth century,

an ideological organization must struggle with the government of the United States to be able to truthfully publish the positions of candidates for public office on a controversial public issue. MCFL urges this Court to summarily affirm the Court of Appeals' decision and cut short this assault on First Amendment freedoms.

Conclusion.

Based on the foregoing arguments and authorities, the appellee MCFL respectfully requests this Court to affirm the decision of the Court of Appeals without further briefing and argument.

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No. 85-701

Supreme Court, U.S.

FILED

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Date	Nr.	Proceedings
1982		
March 4	1	Complaint w/1st Req. for Answers to Interrog. and Prod. of Docs., FILED.
	5	SUMMONS ISSUED. (sent to Marshal)
	26	Summons returned wso/Def on 03/22/82, FILED.
April 12	2	Defendant's Answer and Counterclaims, FILED. (c/s)
	23	D's Request for Production of Docs, FILED. (c/s)
	4	D's 1st Set of Interrogs to P, FILED. (c/s)
May 6	5	Response to P's Request for Production of Docs, FILED. (c/s)
	6	Answers and Objections of Mass. Citizens for Life, Inc. to Interrog Prop by Federal Election Commission, FILED. (c/s)

Date	Nr.	Proceedings
1982		
	20 7	D's Request for Admissions, FILED. (c/s)
	28 8	P's Response to D's Request for Prod of Docs., FILED. (c/s)
	9	P's Objections and Answers to Interrogs Prop by Def, FILED. (c/s)
June 25	10	P, Federal Election Commission's Response to D's Request for Admissions, FILED. (c/s)
July 6	11	Supplementary obj ans ans of Fed Election Commission to ints propounded by deft, filed c/s
	16 13	Supplementary Response to D's Request for Prod of Docs, FILED. (c/s)
	22 14	Motion of D, Mass. Citizens for Life, Inc., for S/J, FILED. (c/s)
	15	Memorandum of Mass. Citizens For Life, Inc. in Support of Its Motion for S/J, FILED. (c/s)
	16	Affidavit of Anne Fox, FILED. (c/s)
	17	Affidavit of Philip D. Moran, FILED. (c/s)
	18	Affidavit of Marianne Rea-Luthin, FILED. (c/s)
Sept. 7	25	Transcript of Deposition of Marianne Rea-Luthin held on 08/19/82, FILED.
	26	Transcript of Deposition of Philip D. Moran held on 08/19/82, FILED.
	13 27	Request for Answers to Interrogs, FILED. (c/s)
Sept. 17	32	Answers and Objections of Mass. Citizens for Life, Inc. to 2nd Set of Interrogs Prop by Federal Election Commission, FILED. (c/s)

Date	Nr.	Proceedings
1982		
Nov. 1	34	P, Federal Election Commission's Motion for Summary Judgment, FILED. (c/s)
	35	Plaintiff's Memo of Points and Authorities in Support of its Motion For Summary Judgment and in Opposition to D's Motion for Summary Judgment, FILED. (c/s)
		GARRITY, J. re: P's Motion for Summary Judgment . . . Notice of Hear 11/26/82 at 2:00 p.m., FILED. (cc/cl)
	10 36	Joint Motion for Rescheduling of Oral Argument on Motions for S/J from 11/26/82 to 12/03/82, FILED. (assented to)
	11	GARRITY, J. re: Joint Motion for Rescheduling of Oral Argument . . . ALLOWED—hearing rescheduled for 12/20/82 at 3:00 p.m., FILED. (c/s)
	12 37	D, Mass. Citizens for Life, Inc's Opposition to P, Federal Election Commission's Motion for Summary Judgment, FILED. (c/s)
	22 40	D's Memo in Opposition to P's Motion for S/J and in Further Support of D's Motion for Summary Judgment, FILED. (c/s)
	41	Motion to Strike of Deft, Mass. Citizens for Life, Inc., FILED. (c/s)
Dec. 6	44	Federal Election Commission's Opposition to D's Motion to Strike, FILED. (c/s)
	45	P, Federal Election Commission's Reply to D's Memo in Opposition to P's Motion for S/J and in Further Support of D's Motion for S/J, FILED. (c/s)
	46	Submission of the Federal Election Commission of Supp. Authority in Support of Its Motion for Summary Judgment, FILED. (c/s)

Date	Nr.	Proceedings
1982		
17	47	Submission of the Federal Election Commission of Supplemental Authority in Support of Its Motion for Summary Judgment, FILED. (c/s)
30	48	D's Response to Submission of the Federal Election Commission of Supplemental Authority in Support of Its Motion for Summary Judgment, FILED. (c/s)
1983		
Jan. 11	49	P, Federal Election Commission's Reply to D's Response to Supp. Submission, FILED. (c/s)
Feb. 9		Ltr. to Clerk from Francis H. Fox enclosing copies of two recent cases to be forwarded to J. Garrity, FILED. (c/s)
1984		
May 7		Ltr. to Clerk from Charles N. Steele, Federal Election Commission advising Court of recent decision in Athens Lumber Co. v. Federal Election Commission, FILED. (c/)
June 29	50	GARRITY, J. OPINION: ORDERED that P's Motion for S/J is DENIED; Deft's Motion is GRANTED and Judgment to be entered for the Deft Dismissing the Complaint, FILED. (cc/cl, Full Publication)
	51	JUDGMENT ENTERED: Judgment for the Deft ENTERED. Complaint Dismissed FILED. (cc/cl)
Aug. 27	52	P's NOTICE OF APPEAL, FILED. (c/s)
Sept. 6		Certified copy of docket entries and original pleadings forwarded to the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,
PLAINTIFF, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
DEFENDANTS, APPELLEES.

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings
Aug. 30	Copy of notice of appeal and district court docket entries received and filed. Case docketed. Notices mailed. (1b)
Sept. 6	Record on Appeal in One Volume received and filed. Notices mailed (ah)
Dec. 13	Brief for appellant, and joint appendix in volumes I&II, received and filed. Notices mailed. (sb)
Jan. 21	Motion of the Reporters Committee for Freedom of the Press National Association of Broadcasters Radio-Television News Directors Association Associated Press Managing Editors for Leave to File a Brief as <i>AMICI CURIAE</i> in Support of Appellee and for Leave to Participate in Oral Argument, received and filed. (ah)
Jan. 21	Motion of the civil liberties union of Massachusetts for leave to file a brief amicus curiae, received and filed. (sb)

Date	Filings—Proceedings
Jan. 21	Brief for appellees, Mass. Citizens for Life, Inc. received and filed. (ah)
Jan. 22	Home Builders Association of Mass., Motion requesting leave to file as amicus curiae received and filed. (lr)
Jan. 22	Motion of National Rifle Association of America (NRA) for leave to file a Brief Amicus Curiae, received and filed. (al)
Feb. 6	ORDER (Breyer, J) The motions of the National Rifle Association, the Civil Liberties Union of Massachusetts, the Home Builders Association of Massachusetts and the Reporters Committee for freedom of the Press et al., for leave to file briefs as Amici Curiae are granted. Reporters' Committees motion to participate in oral argument is denied; and enlarging the time for filing the reply brief for appellant to and including February 21, 1985. Notices mailed. (al)
	Amicus Curiae Brief, received and filed. (al)
	Brief in support of appellee for Amici Curiae, received and filed. (al)
	Brief Amicus Curiae of the Civil Liberties union of Mass., received and filed. (al)
	Brief of amicus curiae, Home Builders Association of Mass. in support of appellee, Mass citizens for life, inc., received and filed. (al)
Feb. 11	Reply brief for appellant, received and filed. (sb)
Mar. 25	Assigned for hearing at the April 1985 session. (kf)
Apr. 2	Heard by Breyer, Torruella and Rosenn, JJ. (sb)
July 31	JUDGMENT: The judgment of the district court is affirmed. Opinion of the Court, By Rosenn, J. Notices mailed. (al)
Aug. 22	Mandate issued. Copy filed. Taxation of Costs filed. Original papers returned to District Court. Notices mailed. (lr)

Date	Filings—Proceedings
Aug. 28	Notice of appeal to the Supreme Court, received and filed. (aw)
Nov. '5	Notice of filing an appeal from the Supreme Court #85-701, October 25, 1985, received and filed. (sb)
Jan. 23	Order of the Supreme Court, January 13, 1986, the statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609G

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.
313 Washington Street
Boston, Massachusetts, DEFENDANT

DEFENDANT'S ANSWER AND COUNTERCLAIMS

DEFENDANT'S ANSWER

Now comes the defendant in the above-captioned action, Massachusetts Citizens for Life, Inc. ("MCFL"), and hereby answers the complaint of the Federal Election Commission ("FEC") as follows:

1. Paragraph 1 contains allegations of law as to which no responsive pleading is required. To the extent that a responsive pleading may be required, MCFL admits that the FEC invokes this court's jurisdiction as it states in the first sentence of paragraph 1, and that it has instituted the action as it states in the second sentence of paragraph 1.

2. MCFL admits the allegations in paragraph 2 of the complaint.

3. MCFL admits the allegations in paragraph 3 of the complaint.

4. Paragraph 4 contains allegations of law as to which no responsive pleading is required.

5. Paragraph 5 contains allegations of law as to which no responsive pleading is required.

6. Paragraph 6 contains allegations of law as to which no responsive pleading is required.

7. Paragraph 7 contains allegations of law as to which no responsive pleading is required.

8. With reference to the allegations in paragraph 8, MCFL states that it caused to be prepared, printed and distributed copies of a newspaper tabloid entitled "Special Election Edition" in September of 1978, and that Exhibit 1 attached to the complaint is a true copy thereof. MCFL denies all remaining allegations in paragraph 8.

9. With reference to the allegations in paragraph 9 as to the contents of the "Special Election Edition", MCFL states that the document speaks for itself. MCFL denies all remaining allegations in paragraph 9.

10. MCFL admits the allegations in the first line of paragraph 10 and denies the allegations in the second line of paragraph 10.

11. With reference to the allegations in paragraph 11 regarding the cost of the "Special Election Edition", MCFL states that it spent approximately \$475.00 for preparation, \$2,113.75 for printing and \$6,841.91 for mailing. MCFL denies all remaining allegations in paragraph 11.

12. With reference to the allegations in paragraph 12, MCFL states that it caused to be prepared, printed, and distributed in September of 1978 a 4-page amended version of the aforementioned "Special

Election Edition" entitled "Special Election Edition—Complimentary Partial Copy", and that Exhibit 2 to the complaint is a true copy thereof. MCFL denies all remaining allegations in paragraph 12.

13. With reference to the allegations in paragraph 13 as to the content of the "Special Election Edition—Complimentary Partial Copy", MCFL states that the document speaks for itself. MCFL denies the remaining allegations in paragraph 13.

14. With reference to the allegations in paragraph 14 regarding the cost of the "Special Election Edition—Complimentary Partial Copy", MCFL states that it spent \$375.00 for printing, and MCFL denies the remaining allegations in paragraph 14.

15. With reference to the allegations in paragraph 15, MCFL says it spent \$9812.76. MCFL denies the allegations in the second sentence of paragraph 15.

16. With reference to the allegations in paragraph 16, MCFL admits that the FEC notified MCFL that it had determined that there was reason to believe that MCFL violated 2 U.S.C. § 441b(a), and further admits that the FEC initiated an investigation into this matter. MCFL is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 16, and therefore it denies the same.

17. With reference to the allegations in paragraph 17, MCFL admits that the FEC notified MCFL that it determined that there was reasonable cause to believe that MCFL had violated 2 U.S.C. § 441b(a). MCFL is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 17, and therefore it denies the same.

18. With reference to the allegations in paragraph 18, MCFL admits that the case was not conciliated, that the FEC purported to find probable cause to believe that MCFL violated 2 U.S.C. § 441b(a), and that MCFL was sent notification of this finding. MCFL denies all remaining allegations in paragraph 18.

19. With reference to the allegations contained in paragraph 19, MCFL admits that the case was not conciliated after the FEC purported to find probable cause. MCFL denies all remaining allegations in paragraph 19.

20. With reference to the allegations in paragraph 20, MCFL admits that MCFL and the FEC did not agree upon the terms of a mutually acceptable conciliation. MCFL is without knowledge or information sufficient to form a belief as to the truth of all remaining allegations contained in paragraph 20, and therefore it denies the same.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted, and MCFL is entitled to judgment in its favor as a matter of law.

SECOND AFFIRMATIVE DEFENSE

MCFL has not violated 2 U.S.C. § 441b because whatever money was spent did not constitute an "expenditure" within the meaning of 2 U.S.C. § 441b.

THIRD AFFIRMATIVE DEFENSE

MCFL has not violated 2 U.S.C. § 441b because its tabloids at issue here fall within the exception to the

definition of "expenditure" for news stories, editorials or commentaries found in 2 U.S.C. § 431, and therefore MCFL's use of funds to prepare, print, and distribute its tabloids was not an expenditure within the meaning of 2 U.S.C. § 441b.

FOURTH AFFIRMATIVE DEFENSE

MCFL has not violated 2 U.S.C. § 441b because its tabloids fall within the exception to the definition of "expenditure" for communications by membership organizations found at 2 U.S.C. § 431, and therefore MCFL's use of funds to prepare, print and distribute its tabloids was not an expenditure within the meaning of 2 U.S.C. § 441b.

FIFTH AFFIRMATIVE DEFENSE

2 U.S.C. § 441b is unconstitutional on its face as a vague and overbroad infringement on the freedom of speech guaranteed to MCFL and its members by the First Amendment to the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

2 U.S.C. § 441b is unconstitutional on its face as a vague and overbroad infringement on the freedom of association guaranteed to MCFL and its members by the First Amendment to the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE

2 U.S.C. § 441b is unconstitutional on its face as a vague and overbroad infringement on the freedom of press guaranteed to MCFL and its members by the First Amendment of the United States Constitution.

EIGHTH AFFIRMATIVE DEFENSE

If 2 U.S.C. § 441b is construed to prohibit MCFL's preparation, publication, and/or distribution of its tabloids, then that section is unconstitutional as applied because it violates the freedom of speech guaranteed to MCFL and its members by the First Amendment to the United States Constitution.

NINTH AFFIRMATIVE DEFENSE

If 2 U.S.C. § 441b is construed to prohibit MCFL's preparation, printing and/or distribution of its tabloids, then that section is unconstitutional as applied because it violates the freedom of association guaranteed to MCFL and its members by the First Amendment to the United States Constitution.

TENTH AFFIRMATIVE DEFENSE

If 2 U.S.C. § 441b is construed to prohibit MCFL's preparation, printing and/or distribution of its tabloids, then that section is unconstitutional as applied because it violates the freedom of press guaranteed to MCFL and its members by the First Amendment to the United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

2 U.S.C. § 441b is unconstitutional because it violates the rights of MCFL and its members to the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

TWELFTH AFFIRMATIVE DEFENSE

2 U.S.C. § 431 is unconstitutional because it violates the rights of MCFL and its members to the

equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, MCFL prays that the court declare the provisions of 2 U.S.C. §§ 441b and 431 relied upon by the FEC unconstitutional, facially and as applied; that it dismiss this action with prejudice; that it award MCFL its reasonable costs and attorneys fees; and that it award MCFL such other and further relief as the court deems just and proper.

**MASSACHUSETTS CITIZENS
FOR LIFE**

By its attorneys,

/s/ R.J. Cinquegrana
Francis H. Fox
E. Susan Garsh
Alexandra Leake
R. J. Cinquegrana
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Dated: 4/12/82

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT

**ANSWERS AND OBJECTIONS OF MASSACHUSETTS
CITIZENS FOR LIFE, INC. TO INTERROGATORIES
PROPOUNDED BY FEDERAL ELECTION COMMISSION**

Massachusetts Citizens for Life, Inc. ("MCFL") answers the Interrogatories propounded by the Federal Election Commission ("FEC") pursuant to Fed. R.Civ.P.33 as follows:

INTERROGATORY NO. 1

Please state whether MCFL is a corporation.

ANSWER TO INTERROGATORY NO. 1

Yes.

INTERROGATORY NO. 2

If the answer to No. 1 is yes, please state the following:

- a. when was MCFL incorporated; and
- b. in what state is MCFL incorporated.

ANSWER TO INTERROGATORY NO. 2

- a. 1973
- b. Commonwealth of Massachusetts.

INTERROGATORY NO. 3

Please identify the persons comprising the board of directors of MCFL during each year from 1976 to the present.

ANSWER TO INTERROGATORY NO. 3

See list attached hereto as *Exhibit A*.

INTERROGATORY NO. 4

Please identify the officers of MCFL during each year from 1976 to the present stating the office held.

ANSWER TO INTERROGATORY NO. 4

See list attached hereto as *Exhibit A*.

INTERROGATORY NO. 5

Please state whether MCFL has ever claimed to be organized as a membership corporation.

OBJECTION TO INTERROGATORY NO. 5

MCFL objects to Interrogatory No. 5 on the grounds that the word "claimed" is vague and ambiguous.

ANSWER TO INTERROGATORY NO. 5

Without waiving its objection, MCFL answers the interrogatory without reference to the word "claimed". MCFL states that, from its inception, it has had members.

INTERROGATORY NO. 6

If the answer to No. 5 is yes for any of the years from 1976 to the present, please state for each such year the following:

- a. how many classes of membership did MCFL claim;
- b. how many members did MCFL claim for each class;
- c. what were the requirements for membership claimed by MCFL for each class; and
- d. what were the rights and privileges accorded each class of members claimed by MCFL.

OBJECTION TO INTERROGATORY NO. 6

MCFL objects to Interrogatory No. 6 on the grounds that the word "claim" is vague and ambiguous, and further, to the extent it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 6

Without waiving its objection, MCFL answers the interrogatory as follows without reference to the word "claim":

- a. 3 (1976-1979)
2 (1980-1982)
- b. The number of members of MCFL constantly changes. For the periods listed below, the approximate membership is as follows:
1976: Non-Contributing—26,750
Contributing and Dues-paying—5,633

1977: Non-contributing—Not known at the present time.

Contributing and Dues-Paying—5,148

1978: Non-contributing—50,674

Contributing and Dues-Paying—5,986

1979: Non-contributing—53,916

Contributing and Dues-Paying—5,498

1980: Non-voting—53,332

Voting—6,321

1981: Non-Voting—50,816

Voting—7,003

1982: Non-voting—48,670

Voting—7,500

c. Non-contributing: Acceptance of MCFL's Statement of Purpose.

Contributing: Donation of any size.

Dues-paying: Annual Contribution of \$15.00.

Non-voting: Those persons who wish to assist the corporation in furtherance of its purposes as set forth in the Articles of Organization, and who affirmatively express in writing a specific and unambiguous desire to become a member of the corporation.

Voting:

Each member who makes an initial contribution to the corporation of at least \$15.00 shall thereupon become a voting member of the corporation for the twelve-month period commencing on the date of such initial contribution.

d. All members are entitled to those rights and privileges, if any, of members as provided by state law. All contributing members are entitled to receive all editions of the MCFL newsletter. All members are entitled on occasion to receive editions of the newsletter. All members are entitled to participate in MCFL fundraising and educational events and are encouraged to design and execute similar activities. With respect to the period 1980 to the present, a description of the rights and privileges accorded each class of members may be derived or ascertained from the By-Laws of MCFL which will be produced for inspection or copying.

INTERROGATORY NO. 7

Please state for those persons whom MCFL considers members the following:

- a. is a specified amount of money required in dues from each class of members claimed by MCFL;
- b. how much are the dues and how often must dues be paid in order to retain membership in MCFL; and

- c. does MCFL retain a written list of persons which it claims as members.

OBJECTION TO INTERROGATORY NO. 7

MCFL objects to Interrogatory No. 7 on the grounds that the words "claimed" and "claims" are vague and ambiguous and, further, to the extent it seeks information for the period after 1978; said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 7

Without waiving its objection, MCFL answers the interrogatory as follows without reference to the words "claimed" and "claims":

- a. See answer to No. 6.
- b. See answer to No. 6.
- c. Yes.

INTERROGATORY NO. 8

Please state whether, in addition to the September, 1978 "Special Election Edition" and the September, 1978 "Special Election Edition—Complimentary Partial Copy," MCFL has disseminated any other editions dealing with federal elections.

OBJECTION TO INTERROGATORY NO. 8

MCFL objects to Interrogatory No. 8 on the ground that the phrase "dealing with federal elections" is vague and ambiguous and seeks information not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 8

Without waiving its objection, MCFL states that the answer may be derived or ascertained from the newsletters of MCFL which will be produced for inspection or copying.

INTERROGATORY NO. 9

If the answer to No. 8 is yes, please state for each edition dealing with federal elections the following:

- a. the title of each edition;
- b. whether the edition concerned candidates for federal office;
- c. the total number of copies printed;
- d. the total number of copies disseminated;
- e. to whom the edition was disseminated;

OBJECTION TO INTERROGATORY NO. 9

See Objection to Interrogatory No. 8.

INTERROGATORY NO. 10

Please state whether MCFL has established a separate segregated fund.

OBJECTION TO INTERROGATORY NO. 10

MCFL objects to Interrogatory No. 10 on the ground that it seeks information not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 10

Without waiving its objection, MCFL states that it has established a separate segregated fund.

INTERROGATORY NO. 11

If the answer to No. 10 is yes, please state the following for any such fund:

- a. when the fund was established;
- b. the name under which the fund is registered;
- c. the identify [sic] of the officers or directors responsible for the operation of the fund; and
- d. whether the fund solicits contributions from persons claimed by MCFL to be members.

OBJECTION TO INTERROGATORY NO. 11

MCFL objects to Interrogatory No. 11 on the grounds that it seeks information not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 11

Without waiving its objection, MCFL answers Interrogatory No. 11 as follows:

- a. May 17, 1980
- b. "Massachusetts Citizens for Life, Inc. Political Action Committee"
- c. The officers of the Fund for the 1981-1982 year are: Marianne Rea-Luthin, Chairman; Henry C. Luthin, Treasurer; Anne Fox, Assistant Treasurer. The Directors of the Fund are: Alice E. Brennan, Anne Fox, Marianne Rea-Luthin, Roderick P. Murphy, Leslie J. Payne, Joseph J. Reilly.
- d. The Fund solicits contributions only from Voting Members of MCFL, as that term is defined in MCFL's by-laws.

INTERROGATORY NO. 12

Please state how many times in each year from 1976 to the present MCFL distributed newsletters to persons claimed by MCFL to be members.

OBJECTION TO INTERROGATORY NO. 12

MCFL objects to Interrogatory No. 12 on the grounds that the word "claimed" is vague and ambiguous, and further, to the extent it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 12

Without waiving its objections, MCFL answers the interrogatory as follows without reference to the word "claimed":

1976—8 times
 1977—5 times
 1978—4 times
 1979—6 times
 1980—3 times
 1981—6 times
 1982—1 to date.

INTERROGATORY NO. 13

Please state how many times in each year from 1976 to the present MCFL distributed newsletters to members of the general public.

OBJECTION TO INTERROGATORY NO. 13

MCFL objects to Interrogatory No. 13 on the grounds that, to the extent it seeks information for

the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 13

Without waiving its objection, MCFL answers that MCFL does not distribute newsletters to members of the general public.

INTERROGATORY NO. 14

Please state the criteria which MCFL uses for determining to whom MCFL's newsletters are distributed.

OBJECTION TO INTERROGATORY NO. 14

MCFL objects to Interrogatory No. 14 on the grounds that, to the extent it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 14

Without involving its objection, MCFL answers Interrogatory No. 14 as follows:

MCFL's newsletters are distributed to members of MCFL who have made a financial contribution to MCFL. On occasion MCFL also distributes its newsletter to its entire membership. MCFL also will provide a copy of its newsletters to individuals who request a copy.

INTERROGATORY NO. 15

Please identify the person or persons responsible for establishing the criteria for the distribution of MCFL's newsletter.

OBJECTION TO INTERROGATORY NO. 15

MCFL objects to Interrogatory No. 15 on the grounds that, to the extent it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 15

Without waiving its objection, MCFL answers Interrogatory No. 15 as follows:

MCFL President and Members of the Executive Committee.

INTERROGATORY NO. 16

Please identify the person or persons responsible for compiling the mailing list for the September, 1978 "Special Election Edition."

ANSWER TO INTERROGATORY NO. 16

Priscilla Laveaga, 91 Cross Street, Belmont, Massachusetts 02178, Telephone: 484-2287.

INTERROGATORY NO. 17

Please state whether MCFL distributes its newsletter to any persons who do not pay dues to MCFL.

OBJECTION TO INTERROGATORY NO. 17

MCFL objects to Interrogatory No. 17 on the ground that, to the extent it seeks information for the periods after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 17

Without waiving its objection, MCFL states that it does distribute its newsletters to persons who do not pay dues to MCFL.

INTERROGATORY NO. 18

If the Answer to No. 18 is yes, please state the following:

- a. the circumstances under which such distribution occurs; and
- b. the frequency with which such distribution occurs.

OBJECTION TO INTERROGATORY NO. 18

MCFL objects to Interrogatory No. 18 on the grounds that, to the extent that it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 18

Without waiving its objection, MCFL answers Interrogatory No. 18 as follows:

- a. In order to inform all members of MCFL of the position of candidates for a variety of public offices on pro-life issues, at various times an edition of the MCFL newsletter is distributed to all members of MCFL.
- b. 1976—1
1978—1
1980—1

INTERROGATORY NO. 19

Please state whether MCFL distributed the "Special Election Edition" to any persons who do not pay dues to MCFL.

ANSWER TO INTERROGATORY NO. 19

Yes.

INTERROGATORY NO. 20

If the answer to No. 20 [sic] is yes, please state the following:

- a. were copies of the "Special Election Edition" distributed to any persons not previously present on any mailing list in the possession of MCFL;
- b. were they distributed to any persons who did not request to receive them; and
- c. if the answer to No. b. is yes, please state the circumstances under which such distribution occurred.

ANSWER TO INTERROGATORY NO. 20

- a. The "Special Election Edition" was distributed only to members whose names were either present on the MCFL mailing list or present on lists of those individuals who had indicated that they agreed with the MCFL statement of purpose; it is also possible that copies were provided to individuals who requested copies.
- b. Yes;
- c. The right to receive MCFL's newsletters was not necessarily communicated to an individual upon that person's becoming a member. Such a person, therefore, did not specifically request to receive newsletters, but did affirmatively accept MCFL's statement of purpose.

INTERROGATORY NO. 21

In your response to the Commission's request for information dated July 31, 1979, you stated that MCFL considered all those persons to be members of MCFL who agreed with MCFL's statement of purpose. Please state:

- a. what is MCFL's statement of purpose; and
- b. how MCFL determines whether a person agrees with its statement of purpose.

ANSWER TO INTERROGATORY NO. 21

As of the period of time referred to in Interrogatory 21:

- a. MCFL's Statement of Purpose was: "In recognition of the fact that each human life is a continuum from conception to natural death, the objective of MCFL is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, legislative, political and other forms of activity."
- b. MCFL determined that a person agrees with its Statement of Purpose when such person so signifies through signing forms, coupons, or petitions or through oral communications with MCFL.

INTERROGATORY NO. 22

In your response to the Commission's request for information dated July 31, 1979, you stated that MCFL determined whether a person was a member of MCFL "by a variety of ways." Please enumerate and describe all the ways employed by MCFL to determine whether a person is a member of MCFL.

ANSWER TO INTERROGATORY NO. 22

See Answer to Interrogatory No. 21 above.

INTERROGATORY NO. 23

Please state the number of members which MCFL has claimed on its membership rolls for each of the years from 1976 to the present.

OBJECTION TO INTERROGATORY NO. 23

MCFL objects to Interrogatory No. 23 on the grounds that the word "claim" is vague and ambiguous, and further, to the extent that it seeks information for the period after 1978, said information is not relevant to the subject matter involved in the pending action.

ANSWER TO INTERROGATORY NO. 23

Without waiving its objections, MCFL answers the interrogatory without reference to the word "claim".

The number of members of MCFL constantly changes. For the periods listed below, the approximate membership is as follows:

1976—32,383

1977—5,148 (contributing members only; the information as to non-contributing members is not available at this time)

1978—55,822

1979—59,414

1980—59,653

1981—57,819

1982—56,170.

/s/ Henry C. Luthin
HENRY C. LUTHIN

MASSACHUSETTS)
) ss.
)

Then personally appeared the above-named Henry C. Luthin, and states that he has read the foregoing Answers and that the contents thereof are true to the best of his knowledge, information and belief.

Before me,

/s/ Lesley Elizabeth Tucker
 Notary Public
 Commission expires
 April 2, 1987

Objections signed this 6th day of May, 1982.

By its attorneys,

/s/ E. Susan Garsh
 E. SUSAN GARSH
 BINGHAM, DANA & GOULD
 100 Federal Street
 Boston, MA 02110
 (617) 357-9300

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.

DEFENDANT'S REQUEST FOR ADMISSION

Defendant requests plaintiff to admit, pursuant to F.R.Civ.P. 36:

1. The two-page document appended hereto and marked "A" is a true and genuine copy of the certification to the Second Circuit Court of Appeals made by George C. Pratt, U.S. District Judge, Eastern District of New York, in "Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, et al," Docket No. 78 C 1658.

2. The 28-page document appended hereto marked "B" is a true and genuine copy of pages 54 through 82 of the "Findings of Fact" made by Judge Pratt in the said case.

3. The documents attached hereto and marked "Stip. Exhibit" AA, BB, CC, DD, EE, FF, GG, HH, HH-1, II, JJ, KK, LL and Defendant CLITRIM Exhibits C and D are true and genuine copies of the exhibits attached to pages 54 through 82 of the "Findings of Fact" referred to in the preceding paragraph.

4. The said Findings were made on or about August 22, 1979, following a trial in the said case on June 25-28, 1979.

5. Each of the numbered findings was true as of June 25-28, 1979.

6. Each of the numbered findings was true as of August 22, 1979.

7. Each of the numbered findings was true as of November, 1978.

By its attorneys,

/s/ Francis H. Fox
FRANCIS H. FOX

/s/ E. Susan Garsh
E. SUSAN GARSH
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

[Certificate of Service Omitted in Printing]

EXHIBIT A

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

—————
Docket No. 78 C 1658

FEDERAL ELECTION COMMISSION, PLAINTIFF,

—against—

CENTRAL LONG ISLAND TAX REFORM
IMMEDIATELY COMMITTEE ET AL., DEFENDANTS.

—————
CERTIFICATION TO THE UNITED STATES
COURT OF APPEALS FOR THE
SECOND CIRCUIT

Pursuant to orders of the United States Court of Appeals for the Second Circuit dated April 23, 1979 and May 2, 1979, the undersigned hereby certifies to the circuit court the following:

1. Clerk's file, including transcripts of evidentiary hearings. This is under separate cover.

2. Hearing exhibits as follows:

Court's Exhibits 1, 2 & 3 with exhibits attached thereto.

Plaintiff's Exhibits Y-1, 1-5, 8-22(o).

Defendants' and Intervenor's Exhibits A, B, D-Y, BB & CC.

All of those exhibits are under separate cover.

3. Summary of Procedural History (infra, p. 3)
4. Statement of Constitutional Issues (infra, p. 7)
5. Statement of Statutory Questions (infra, p. 9)
6. Findings of Fact (infra, p. 11)

Dated: Westbury, New York
August 22, 1979

/s/ George C. Pratt
GEORGE C. PRATT
U. S. District Judge

EXHIBIT B

* * * * *

VII. OTHER ISSUE-ORIENTED ORGANIZATIONS AND THEIR ACTIVITIES

A. ACLU

1. Ira Glasser is currently the Executive Director of the American Civil Liberties Union (ACLU). From 1968 until 1978, he was Associate Director and then Executive Director of the New York Civil Liberties Union. He has had wide experience running and dealing with volunteer, membership organizations, and observing the way they function. (TR 392-3).

2. The ACLU is non-partisan, issue-oriented organization.

3. Ira Glasser qualified as an expert witness on the functioning of voluntary, membership organizations. (Glasser Testimony, Trial Transcript at p. 395).

4. In his experience, he has observed that a wide variety of non-partisan, issue-oriented groups and organizations in America, who do not endorse, support or oppose partisan candidates, nevertheless, publicly comment on the official conduct of government officials. (TR 398).

5. He has also observed that a wide variety of non-partisan, issue-oriented groups, who do not endorse, support or oppose partisan candidates, take positions on public issues or questions which may also be issues in a partisan electoral campaign. (TR 399).

6. Many non-partisan, issue-oriented groups publish and comment upon, criticize, or praise the voting records of elected officials on issues of interest and concern to the relevant group (TR 393).

7. Such activity intensifies during the time of election campaign, because that is when citizen interest in public issues is at its peak. (TR 401).

8. The ACLU and the NYCLU, in their organizational newsletter, periodically rate the civil liberties performance of elected officials. (TR 408).

9. Such newsletters (e.g., Exs. GG & HH attached to Ct.Ex.1) are distributed to ACLU members, to the news media, to public officials and to members of the public. (TR 412).

10. Such newsletters are frequently produced and distributed in the Fall of election years. [The legislative sessions in those years usually run through the Summer, and the "box scores" cannot be put out until the Fall.] Their effectiveness and the interest they generate is increased when published during a campaign period. (TR 402).

11. The purpose of such activity is to publicize the organization's views and positions on civil liberties issues in order to influence public opinion and official action on such issues. (TR 411).

12. The purpose of such activities is not to influence the election or defeat of any specific candidate, but such activities are intended to inform and may influence the way citizens vote in an election. They also seem to influence actions by legislators. (TR 406-7).

13. Based on his expertise in the working of voluntary membership organizations, and their local committees, branches and chapters, Mr. Glasser is aware of the difficulty of sustaining citizen interest and participation at the grass roots level, particularly on controversial issues. (TR 413).

14. Such local volunteer committees and chapters are fragile enterprises. Any impediment may cause

individuals to refrain from activity or to cease their activity. (TR 413).

15. In Mr. Glasser's opinion the burden of record-keeping, reporting and certification and the prospect of compliance with disclosure requirements of 2 USC Sections 434(e) and 441d would deter and chill members of committees and chapters from engaging in activity which would bring those requirements into play, particularly in the case of unpopular, controversial or "parish" organizations. (TR 414).

16. In Mr. Glasser's opinion, people do not want to register and file forms with the government or disclose their names to the government in order to engage in free speech activity because of principle, fear, or inconvenience. (TR 416).

17. If the ACLU and its affiliates had to comply with the requirements imposed by 2 U.S.C. Section 434(e), because of their "box scores" on elected officials, they could not do so because of the policy against disclosure of members and contributors and because they could not relate expenditures to particular issues. Instead, they would bring those requirements into effect. (TR 417).

18. Compliance with such requirements would also pose severe record-keeping and accounting burdens upon the ACLU. (TR 417).

19. Since the ACLU is a corporation, the ACLU's box score or voting record activity brings it within the coverage of the Act, it could conceivably be charged with violating the ban on any corporation's making a "contribution or expenditure in connection with" a federal election. 2 U.S.C. § 441b(a). The only way to avoid the problem would be to set up a "political action committee," which would directly conflict with the ACLU's constitution and by-laws

which require it to be wholly non-partisan. (TR 420).

20. Although non-partisan, issue-oriented groups do not support or oppose candidates for elective office, such groups seek to have their issues become campaign issues. (Glasser Testimony, Trial Transcript at p. 400).

21. The reason for this is that electoral campaigns can serve to focus public attention on the issues that the group is concerned about. (Glasser Testimony, Trial Transcript, pp. 400-402).

22. The use of "box score" or voting records information by issue-oriented groups enhances the ability of those groups to influence the official conduct of the elected officials whose record is rated. The reason for this is that such officials are more responsive to issue group arguments if the officials know that their voting records will be set forth by the issue group at the conclusion of the legislative session. (Glasser Testimony, Trial Transcript at p. 406).

23. Local volunteer committees and groups are notoriously unwilling to fill out forms and records, even those required by the organizations with which they are affiliated. (Glasser Testimony, Trial Transcript at p. 414).

24. If the ACLU had to set up a political fund or political committee in order to continue its voting records activity, not only would its own constitution and by-laws prohibit that, but such action would jeopardize its tax status and undermine its reputation and standing as a non-partisan, issue-oriented group. (Glasser Testimony, Trial Transcript at p. 419).

25. Over the years, ACLU has published a number of newspaper advertisements, articles and reports rating and evaluating the performance of elected public officials:

- (a) In 1971, it published two full-page advertisements in *The New York Times*, sharply critical of the activities of former Vice President Nelson Rockefeller, the then-Governor of New York, and the state legislative. (Exhibits AA and BB).
- (b) In October, 1972—a month before the nationwide federal elections—it published an advertisement in *The New York Times* sharply criticizing President Nixon's "anti-busing" stand. The advertisement contained an "Honor Roll" of approximately 100 members of Congress who had opposed the President on that issue, and urged public support for those Representatives. (Exhibit CC).
- (c) In 1973, a three-judge court ruled that "plaintiff organizations, on the basis of the advertisements are not subject to Title III regulation." (*ACLU v. Jennings*, 366 F. Supp. 1041, 1057).
- (d) In the fall of 1973, the ACLU sponsored a series of full-page advertisements in *The New York Times* urging the impeachment of President Nixon, for violation of civil liberties. (Exhibit DD).
- (e) In September, 1974, the ACLU published a similar advertisement in *The New York Times* sharply criticizing President Ford's pardon of Richard Nixon, characterizing it as a "sneak attack" on the Constitution. (Exhibit EE).
- (f) The New York affiliate of the ACLU periodically publishes a newsletter in which it

discusses the actions of federal and state legislative leaders on key civil liberties issues, lists the voting records of all legislators on those issues and contains a separate "Honor Roll" of those legislators who scored highest. (Exhibits FF and GG).

- (g) The ACLU Washington legislative office periodically publishes a newsletter, *Civil Liberties Alert*, containing a "box score" of the civil rights and civil liberties voting records of all members of Congress, indicating whether they voted "in favor of" or "contrary to" the ACLU position on specific proposed legislation involving selected issues. (Exhibit HH).

- (h) All such activities cost in excess of \$100.

26. The ACLU has gone to court on three occasions to resist the possibility of such disclosure of the names of its members and contributors which might be required by campaign reform legislation. *ACLU v. Jennings*, *Buckley v. Valeo*, *NYCLU v. Acito*.

27. The ACLU, which has repeatedly litigated to insure that campaign finance controls will not reach non-partisan, issue-oriented groups, now considers itself at risk of enforcement by virtue of the FEC position on this case. (Glasser Testimony, Trial Transcript at p. 422).

B. NYCLU

1. "The New York Civil Liberties Union (NYCLU), an affiliate of the American Civil Liberties Union, is a non-partisan organization, dedicated to defending the rights guaranteed to persons under the Constitution of the United States and having as a prin-

cipal function the dissemination of information concerning such rights within the State of New York." *Buckley v. Valeo* (Court Finding 2).

2. "As the New York State affiliate of the ACLU, the NYCLU is barred by the ACLU Constitution and policies from endorsing or opposing any candidate for public office. NYCLU is, however, allowed to criticize public officials whose conduct violates civil liberties and to publicize the civil liberties record of any government official." *Buckley v. Valeo* (Court Finding 3).

3. "No advertisement, petition, or public statement of the NYCLU has ever advocated the election or defeat of a political candidate." *Buckley v. Valeo* (Court Finding 4).

4. "Although NYCLU does not endorse or oppose the election of candidates, its advertisements, statements of views on public issues, and other similar activities frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office. The fact that a public official identified in NYCLU public information activities is also at the time a candidate for public office is not directly related to the intent or purpose of the advertisement." *Id.* (Court Finding 4).

5. "NYCLU regularly publicizes in its membership newsletter and through pamphlets and other publications, the civil liberties voting records, positions and actions of elected public officials, some of whom are candidates for federal office." *Id.* (Court Finding 5).

6. "NYCLU's experience has been that membership in association or identification with and support

for NYCLU is controversial." *Buckley v. Valeo* (Court Finding 13).

7. "NYCLU members and contributors request explicit assurances that their membership will remain confidential and their contribution anonymous." *Id.* (Court Finding 15).

C. U. S. Chamber of Commerce

1. In 1976, the Federal Election Commission informed the United States Chamber of Commerce that public distribution of a booklet entitled "How They Voted" to nonmembers of the Chamber would violate 2 U.S.C. Section 441b. (Ex.LL, attached to Ct. Ex.1, FEC Opinion Request No.O/R 790).

2. The booklet "rated" the votes of all members of Congress, whether or not they were candidates for re-election. The ratings listed the votes as either "right" or "wrong" on a number of major policy issues, in accordance with the Chamber's position on such issues. (*Id.*)

3. The booklet made no reference to any campaigns or federal elections, and did not advocate the election or defeat of any candidate. (*Id.*)

4. In 1978, the Chamber of Commerce asked the Federal Election Commission whether it could distribute to members of Congress the identical 1978 version of "How They Voted." The FEC, in an Advisory Opinion (AO-1978-18), ruled that although the distribution to members of Congress would not violate the Act, "... distribution of the publication, by or on behalf of the Chamber, to other persons who are nonmembers of Chamber or its State or local affiliates would be unlawful under 2 U.S.C. § 441b

..." (Ex.KK annexed to Ct.Ex.1, Advisory Opinion, AO 1978-18).

5. Joan D. Aikens, Vice-Chairman of the Federal Election Commission, filed a dissenting opinion in that matter in which she stated:

The Commission is doing that which Congress would not dare do itself. By approving this Advisory Opinion, this Commission is successfully insulating elected representatives from the sometimes uncomfortable experience of having their positions on issues, as manifested by their votes in Congress, compared to the positions of various public organizations. The Commission has done this by construing § 441b in such a sweeping manner that the section may now encompass virtually any communication by a union or corporation (including corporations without capital stock) which can be interpreted as criticism of a Congressman's vote. If Congress had expressly articulated such an intended result, there, I think, would have been a significant and justified public outcry. The total absence within the legislative history of § 441b (and its predecessor 18 U.S.C. § 610) of any Congressional desire to regulate this type of speech seems to indicate a healthy respect for the political dangers of advocating such legislation as well as an appreciation of the enormous constitutional questions it would raise. (*Id.*)

6. Commissioner Aikens' opinion further stated that under the FEC's interpretation of § 441b, "... it would be a violation of the Act for the ACLU to finance a communication directed at the general public which states its views on any votes by elected fed-

eral officers on legislation involving questions of civil liberties. But see *ACLU [v. Jennings] supra.*" (*Id.*)

D. *United Church of Christ*

1. The United Church of Christ is a major Protestant fellowship which was formed in 1957 through the union of the Evangelical and Reformed Church and the Congregational Christian Churches. It is presently composed of some six thousand local congregations, having a membership of approximately two million persons. Ex.11 & JJ attached to Ct. Ex. 1; TR 332, 369).

2. The mission of the Church includes a recognized responsibility "at home and abroad for mission, aid and service, ecumenical relations, interchurch relations and Christian unity, education, publication, the ministry, ministerial pensions and relief, evangelism, stewardship, social action, health and welfare, and any other appropriate area of need or concern" (Church Constitution—Article VIII). In all these efforts and others there is a recognition that the creation of a just society also requires witness and advocacy to the sources of political power which shape the public policy of the United States and the world. (TR 334).

3. Thus, a system of monitoring and communicating to members and to the general public, administrative, legislative and judicial developments that affect the Church's mission is an essential component of the Church's ministry. It is also an important vehicle for the exchange of ideas about social and governmental issues. (TR 336).

4. The Office for Church in Society ("OCIS") is the cornerstone of this system. It monitors and reports on governmental affairs, with a particular focus

on the manner and degree to which official and quasi-official governmental activities assist or retard the cause of peace, the eradication of hunger, the relief of the poor, and the general social welfare of the nation. (TR 333, 336).

5. The mandate of OCIS is stated in paragraph 221 of the Church By-Laws:

"The Office for Church in Society shall study the content of the Gospel in its bearing on people in society, *provide and publish information and literature on social issues*, cooperate with Instrumentalities of the United Church of Christ with other appropriate bodies in making the implications of the Gospel effective in society, assist the Executive Council in its coordination function as it pertains to social education and action, *and formulate and promote a program of social education and action for the United Church of Christ.*" (emphasis added).

(CLITRIM Ex.C; TR 335).

6. OCIS engages in three primary activities: First, it takes policy positions that have been adopted by the Church's general synod and advocates these positions before a variety of agencies and institutions including congressional committees and administrative agencies. Second, OCIS engages in a program of "constituency action" which is intended "to generate interest [in] social change issues at the local level." Finally, OCIS attempts to coordinate social action within the entire United Church of Christ denomination. (Lynn Testimony, Trial Transcript at p. 333).

7. In order to further the objectives that are described in the preceding paragraph, OCIS publishes

position papers, "fact-sheets" and a variety of other documents. These papers and documents are distributed to church members, to legislators and to other interested persons. Members of the staff of OCIS also appear on radio and television programs in order to discuss issues of interest to the church. And the OCIS also publishes and distributes a monthly newsletter, now entitled "UCC Network" and formerly entitled "Washington Report," which "serves to give its readers information about what is happening, principally in Washington, on critical legislative issues" for example "world hunger or the draft of international affairs." (Lynn Testimony, Trial Transcript at p. 336).

8. The annual congressional voting chart, as it has appeared in "Washington Report," is generally prepared at the end of the legislative session which, in a non-election year, would generally mean that the voting chart would be published in December or January. The reason that the voting chart is published at this point in time is that, usually, "one has to wait until well into the year, sometimes well into the session, to get substantive votes on the most important issues that the church has been addressing." (Lynn Testimony, Trial Transcript at pp. 343-344).

9. The voting chart that appears in the January 1978 issue of Washington Report is typical of the voting charts that have been sent out by OCIS over the years. (Lynn Testimony, Trial Transcript at p. 338).

10. Washington Report and UCC Network, including the annual issue containing the congressional voting chart, are distributed not only to members of the church, but to other interested persons as well. (Lynn Testimony, Trial Transcript at p. 340).

11. The voting chart within the "Washington Report," now "UCC Network," has typically been used by members of the church who receive the publication "as a principal source of information on some very important issues." Some church members use the publication "in Sunday School classes . . . where they are discussing social issues." Others use the publication as a way to decide what issues to discuss in letters to legislators, or in conversations with legislators. The publication is also used "by . . . local people as a kind of test [of] whether they, and the OCIS in partnership, have been successful in promoting the advocacy efforts of the denomination." (Lynn Testimony, Trial Transcript at pp. 343, 345, 346).

12. The cost of publishing the annual congressional voting chart exceeds a thousand dollars—if one includes in the cost the staff time that is devoted to research and gathering information, writing and editing the publication as well as the costs of printing and distributing. (Lynn Testimony, Trial Transcript at p. 347)

13. The Office for Church in Society has never registered with the Federal Election Commission as a political committee. (Lynn Testimony, Trial Transcript at p. 347).

14. The newsletter and the voting record that appears in it do not refer to any federal election, and do not mention any members' candidacy for elective office. (Ex.II attached to Ct.Ex.1; TR 337, 338, 354, 359).

15. The OCIS and the Church have never endorsed, contributed to, or advocated the election or defeat of any candidate for public office. (TR 337, 338, 354, 359).

16. In future publications of UCC Network, it is the desire and intent of OCIS to follow the same general format with respect to the publication of congressional voting records as is set forth in the January, 1978 issue of "Washington Report." (Ex. II attached to Ct.Ex.1; TR 350, 352, 356).

17. If forced to stop publishing the congressional voting chart, a vital and important vehicle for adhering to the mandate of the Church would be lost. As described by Reverend Barry Lynn, and official with OCIS; "This [voting chart] has proven to be, in the past, a very important piece of information for use at all levels of the church. . . . this [publication] is a document that is part of the ministry of the United Church of Christ . . . Now, if we cannot publish it, then we violate not only the sense of what the Constitution and By-Laws of the United Church of Christ provide, but I think we violate the mandate of the Gospel itself, which involves us and calls us to be serious interpreters of social issues and calls us to be involved with the government in a serious way." (Lynn Testimony, Trial Transcript at pp. 350-351).

18. The discontinuance of a publication such as the OCIS congressional voting chart would also have a serious impact upon public discourse of social and political issues. As Reverend Lynn observed: "Some [legislative] decisions are very complicated. Motions are hidden in huge appropriations bills. The most important thing in a bill might be an amendment to the bill that never gets reported at all in the newspapers. If [our members] are going to be informed people making informed issue-decisions, then I think they need publications like this; and many of our members are not members of the National Taxpayers Union, or the ACLU, or Common Cause or anybody

else. This is the way that they get information on public policy issues, and this is the way they get information on the votes taken by members of the Congress, so that they can have healthy dialogue at any time of the year that they have a chance to talk to their elected officials." (Lynn Testimony, Trial Transcript at pp. 352-353).

19. The United Church of Christ and the Office of Church in Society are "not in the business of partisan advocacy" they simply publish the congressional voting chart "as a way to get a more informed discussion of the issues themselves. And that [is their] principal goal." (Lynn Testimony, Trial Transcript at p. 361).

E. *Public Citizen*

1. Public Citizen is a non-profit corporation which was established by Ralph Nader in 1971 to promote and publicize issues of importance and interest to consumers. Public Citizen does not have a political action committee, does not endorse particular candidates, and does not advocate the election or defeat of any candidate. Rather, its activities, which include litigation, lobbying, and various educational projects, are limited to the advocacy of its views on specific consumer issues.

2. Congress Watch is the lobbying arm of Public Citizen. Each year, Congress Watch prepares a Voting Index covering all members of Congress. The Index lists a certain number of votes in each House on issues of important to Public Citizen, compares each member's votes with Public Citizen's position, and summarizes this comparison by calculating the percentage of votes that each member cast in favor of Public Citizen's position. (TR 371, 373).

3. Public Citizen's Voting Index is distributed to members of Congress and the general public, and it is accompanied by press releases in order to draw public and media attention to the issues contained in the Index. (CLITRIM Ex.BB; TR 374).

4. Public Citizen also distributes and publicizes its Voting Indexes in selected congressional districts for the same purpose. (TR 374).

5. Consistent with Public Citizen's policies, no Voting Index or press release contains any statement advocating the election or defeat of any candidate. The Indexes are published because analysis of Congressional voting performance is inseparable from Congress Watch's efforts to promote its legislative program. (TR 374-5).

6. The 1978 Public Citizen Congressional Voting Index is typical of the voting indices prepared by Public Citizen. (Karpinski Testimony, Trial Transcript at p. 374).

7. Public Citizen's purpose in distributing a voting index, is to "educate consumers around the country about consumer issues, and specifically about the performance of their representatives and senators on those issues." A second function of the Public Citizen Congressional Voting Index is to announce to the public and to members of Congress the issues that Public Citizen considers "most important in a given session." (Karpinski Testimony, Trial Transcript at pp. 375-376).

8. In 1978, Congress Watch also prepared detailed "profiles" of twelve members of Congress who were in either their first or second terms. The profiles discussed the selected members, activities in detail, focusing on their performance, electoral history, voting patterns, congressional relationships, and views on issues

of concern to Public Citizen. The profiles also typically contain a chart describing how the subject of the profile has been evaluated by other interest groups, including the American Conservative Union, Chamber of Commerce, National Associated Businessman, National Taxpayers Union, National Council of Senior Citizens, American for Democratic Action, AFL-CIO Committee on Political Education, League of Conservation Voters, Consumer Federation of America. (TR 376-7).

9. The Congress Watch Profile that was prepared with respect to Abner Mikva, (and that was marked for identification as Defendant's Exhibit CC and has been admitted into evidence as part of Court's Exhibit 1, Ex.HH-1), is typical of the congressional profiles that are prepared by Congress Watch. (Karpinski Testimony, Trial Transcript at p. 378).

10. The members of Congress profiled span the political spectrum; Democrats and Republicans were included, as were those with high Public Citizens ratings, moderate ratings and low ratings. (Ex.HH-1 attached to Ct.Ex.1, TR 337).

11. Some of the members who were the subjects of profiles faced close electoral races, while others had little or no electoral competition. No profile advocated the election or rejection of any candidate. Rather, they evaluated certain members from Public Citizen's perspective and with respect to issues that were of concern to Public Citizen in order to inform the citizens of these twelve districts how their representatives were performing. (TR 376, 388).

12. The annual Public Citizen Voting Index costs well over one thousand dollars to prepare, publish and distribute each year. (Karpinski Testimony, Trial Transcript at p. 379).

13. In addition to preparing and distributing the voting indices and the profiles, Congress Watch also lobbies before Congress on behalf of consumer issues, and testifies before congressional committees with respect to consumer issues. It also publishes other material about issues and about the activities of Congress and its members. (Karpinski Testimony, Trial Transcript at p. 380).

14. Congress Watch engages in the full range of its activities throughout the entire year. (Karpinski Testimony, Trial Transcript at p. 380).

15. The publication of Public Citizen's Congressional Voting Index cannot precede the conclusion of the legislative session "because [many] important votes occur in the last two or three weeks of a Congress." Nevertheless, Public Citizen attempts to publish its voting record as soon as possible, after the Congressional session ends. Thus, in 1978, Congress concluded its session during the second week of October and the Public Citizen Voting Index was published before the end of that month. (Karpinski Testimony, Trial Transcript at p. 383).

16. Voting indices and Congressional policies are typically distributed by Congress Watch and Public Citizen even after the November elections. Indeed, the voting index is available for general sale to the public and more copies of the index are sold or distributed after Election Day than before it. (Karpinski Testimony, Trial Transcript, pp. 383-384).

17. If Public Citizen and Congress Watch were required to register as political committees in order to publish their voting index and profiles, they would not register and would, instead, discontinue publication of the voting index and of the profiles. (Karpinski Testimony, Trial Transcript at p. 384).

18. If Congress Watch and Public Citizen were to decide not to publish the voting index and Congressional profiles in their educational and advocacy efforts would be hampered. As Mr. Gene Karpinski, an official with Congress Watch stated: "... [I]f members [of Congress] feel more insulated [from scrutiny] and are aware that their performance might not be recorded as frequently or offered at all [to] the district, ... they would not have to be responsive to what we suggested [regarding] how to vote on pro-consumer legislation." Also, "it would hamper the ability of our consumer activists around the country to learn about their members and respond to what their members do." (Karpinski Testimony, Trial Transcript at pp. 385-386).

19. Congress Watch regards publication of the voting indexes and profiles as an essential element of Citizen Watch's program of advocacy and educational efforts on behalf of consumers, because citizens need ready access to detailed information on the performance of their legislators. Citizen Watch's publications are designed to provide such information, without advocating the election or defeat of any candidate. (TR 381).

20. These factors have been brought before the Federal Election Commission in an Advisory Opinion Request (AOR 1978-62) filed in 1978 to determine whether the activities described herein come within the reach of the relevant provisions of the Federal Election Campaign Act. The matter has been pending before the Commission for approximately one year. (TR 386).

F. *New York Times*

1. On February 11, 1979, an article appeared in the Long Island edition of *The New York Times*,

which (1) discussed Congressman Ambro's views on ratings of voting records of members of Congress, and (2) set forth the ratings that the six Long Island Congressmen had received on "key issues" from the Americans for Democratic Action (ADA), the Americans for Constitutional Action (ACA) and the American Conservative Union (ACU). (CLITRIM Ex.D).

G. Conclusion

The publication and dissemination of Congressional Voting Records by the United Church of Christ by Public Citizen, by the NYCLU, by the ACLU and by the Chamber of Commerce are similar to the leafletting activity undertaken by CLITRIM, which is the subject of this action, in the following respects: All such activity represents traditional non-partisan speech where no express advocacy of particular electoral candidates is undertaken. Moreover, such expression constitutes a longstanding form of public disclosure in this country which substantially advances the exchange of ideas about social and political issues. Such expression would be significantly impeded and deterred if the Federal Election Campaign Act were held to impose regulatory restrictions upon such activity.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

OBJECTIONS AND ANSWERS OF FEDERAL ELECTION COMMISSION TO INTERROGATORIES PROPOUNDED BY DEFENDANT

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the Federal Election Commission (the "Commission") submits the following objections and answers to Defendant's First Set of Interrogatories:

Interrogatory No. 1

Please state the name, address and title of the individual who signs answers to these interrogatories on behalf of plaintiff.

Answer To Interrogatory No. 1

Charles N. Steele, General Counsel; Lawrence M. Noble, Assistant General Counsel; and R. Lee Andersen, Attorney, the Office of General Counsel, Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463.

Interrogatory No. 2

If plaintiff contends, having conducted its investigation, that the publication is not a "newspaper" as that term is used in 2 U.S.C. § 431(f)(4)(A) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present) please:

- a. state what plaintiff believes to be the definition of "newspaper" for purposes of that statute,
- b. state what source plaintiff relies upon as having provided that definition,
- c. describe in detail what features or characteristics of the said publication disqualify it from being considered a "newspaper."

Objection To Interrogatory No. 2

The Commission objects to Interrogatory No. 2 and its subparts on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 2

Without waiving its objection, the Commission answers Interrogatory No. 2 as follows: the Commission contends that the September 1978 materials that exhorted readers to vote for candidates opposing abortion are not newspapers for purposes of 2 U.S.C. § 431(f)(4)(A).

- a. The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (the "Act") does not contain a specific definition of the term "newspaper." The Commission determines the validity of each asserted claim that activity which would be an expenditure or contribution is exempted by virtue of 2 U.S.C.

§ 431(f)(4)(A) on a case-by-case basis. The Commission's determinations are based upon the facts available, all relevant legislative history and applicable statutory and case law.

- b. See answer to Part a. above.

Additional Objections To Part c.

In addition to the Commission's objection to Interrogatory No. 2 stated above, the Commission objects to part c. because it asks for resolution of an ultimate legal issue in this action. Moreover, the Commission objects to part c. because discovery is still proceeding in this action and a definitive attempt to answer this part would be premature.

Answer To Part c.

Without waiving its additional objections to part c., the Commission answers that defendant has failed to make even a minimal showing that the September 1978 materials that exhorted readers to vote for candidates opposing abortion were any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.

Interrogatory No. 3

If plaintiff contends, having conducted its investigation, that the publication is not an "other periodical publication" as that term is used in 2 U.S.C. § 431(f)(4)(A) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present), please:

- a. state what plaintiff believes to be the definition of "other periodical publication" for purposes of that statute,

- b. state what source plaintiff relies upon as having provided that definition,
- c. describe in detail what features or characteristics of the said publication disqualify it from being considered an "other periodical publication."

Objection To Interrogatory No. 3

The Commission objects to Interrogatory No. 3 and its subparts on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 3

Without waiving its objection, the Commission answers Interrogatory No. 3 as follows: the Commission contends that the September 1978 materials that exhorted readers to vote for candidates opposing abortion are not "other periodical publication(s)" for purposes of 2 U.S.C. § 431(f)(4)(C).

a. The Act does not contain a specific definition of the term "other periodical publication." The Commission determines the validity of each asserted claim that activity which would be an expenditure or contribution is exempted by virtue of 2 U.S.C. § 431(f)(4)(A) on a case-by-case basis. The Commission's determinations are based upon all facts available, relevant legislative history and applicable statutory and case law.

b. See answer to part a. above.

Additional Objections To Part c.

In addition to the Commission's objection to Interrogatory No. 3 stated above, the Commission objects to part c. because it asks for resolution of an ultimate legal issue in this action. Moreover, the Com-

mission objects to part c. because discovery is still proceeding in this action and a definitive attempt to answer this part would be premature.

Answer To Part c.

Without waiving its additional objections to part c., the Commission answers that defendant has failed to make even a minimal showing that the September 1978 materials that exhorted readers to vote for candidates opposing abortion were any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.

Interrogatory No. 4

Does the FEC agree that the publication constitutes a newsletter?

- a. If so, set forth in detail wherein a newsletter differs from a newspaper for purposes of the exclusion from the definition of expenditure referred to in Interrogatory No. 2.
- b. If not, describe in detail what features or characteristics of the publication preclude it from being a newsletter.

Objection To Interrogatory No. 4

The Commission objects to Interrogatory No. 4 and its subparts on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 4

Without waiving its objection, the Commission answers Interrogatory No. 4 as follows: the Commission contends that the September 1978 materials that

exhorted readers to vote for candidates opposing abortion are not newsletters for purposes of 2 U.S.C. § 431(f)(4)(C).

a. Not applicable.

Additional Objections To Part b.

In addition to the Commission's objection to Interrogatory No. 4 stated above, the Commission objects to part b. because it asks for resolution of an ultimate legal issue in this action. Moreover, the Commission objects to part b. because discovery is still proceeding in this action and a definitive attempt to answer this part would be premature.

Answer To Part b.

Without waiving its additional objections to part b., the Commission answers that defendant has failed to make even a minimal showing that the September 1978 materials that exhorted readers to vote for candidates opposing abortion were any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.

Interrogatory No. 5

Please set forth each and every reason why the publication is not excluded from the definition of "expenditure" by 2 U.S.C. § 431(f)(4)(a) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present).

Objection To Interrogatory No. 5

See answers to Interrogatories No. 2, 3 and 4 above.

Answer To Interrogatory No. 5

Without waiving its objection, the Commission answers that defendant has failed to make even a minimal showing that the September 1978 materials that exhorted readers to vote for candidates opposing abortion were any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.

Interrogatory No. 6

Has the FEC found reason to believe, or reasonable cause to believe, or probable cause to believe that any other nonprofit corporation has made an impermissible expenditure in connection with an election by reason of material printed in that organization's newsletter, newspaper, tabloid, periodical or similar publication?

Objection To Interrogatory No. 6

The Commission objects to Interrogatory No. 6 on the grounds that the term "similar publication" is vague and ambiguous.

Interrogatory No. 7

If your answer to the previous interrogatory is not in the negative, please:

- a. identify the nonprofit corporation by name and state of incorporation,
- b. identify the FEC's docket or file number in the case,
- c. give the date of the said finding by the FEC,

- d. give the date of each publication giving rise to the finding.

Answer To Interrogatory No. 7

See answer to Interrogatory No. 6.

Interrogatory No. 8

Has the FEC brought any court action against any nonprofit corporation alleging that the corporation has made an impermissible expenditure in connection with an election by reason of material printed in that organization's newsletter, newspaper, tabloid, periodical or similar publication?

Objection To Interrogatory No. 8

The Commission objects to Interrogatory No. 8 on the grounds that the term "similar publication" is vague and ambiguous.

Interrogatory No. 9

If your answer to the previous interrogatory is not in the negative, please:

- a. identify the nonprofit organization, by name and state of incorporation,
- b. state the title or caption of the case,
- c. identify the court in which the action was brought, giving the docket number,
- d. state whether or not there has been any determination by the court on the merits of the FEC's contention, and, if so, what date the court determination was entered.

Answer To Interrogatory No. 9

See answer to Interrogatory No. 4.

Interrogatory No. 10

The FEC has alleged in paragraph 10 of the Complaint that the publication was mailed to 50,000 people who were not members of MCFL. Please:

- a. define what you mean by "members" as that term is used in 2 U.S.C. § 431(f)(4)(C) (as of September, 1978) or 2 U.S.C. § 431(9)(B) (iii) (at present),
- b. state each and every reason why the said people to whom the publication was allegedly mailed did not qualify as "members."

Objection To Interrogatory No. 10

The Commission objects to Interrogatory No. 10 on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 10

Without waiving its objection, the Commission answers that the term "members" is defined in Commission Regulation 11 C.F.R. § 114.1(e), numerous Advisory Opinions including 1976-79, 1977-67, 1979-69 and 1980-75, as well as relevant legislative history and court cases.

Additional Objections to Part b.

In addition to the Commission's objection to Interrogatory No. 10 state above, the Commission objects to part b. because it asks for resolution of an ultimate legal issue in this action. Moreover, the Com-

mission objects to part b. because discovery is still proceeding in this action and a definitive attempt to answer this part would be premature.

Answer to Part b.

Without waiving its additional objections to part b., the Commission answers that 50,000 persons receiving the September 1978 materials that exhorted readers to vote for candidates opposing abortion, identified in defendant's response to the Commission's first set of interrogatories as "Non-contributing Members", did not qualify as members for at least the following reasons: defendant's formal documents precluded members; "Non-contributing Members" had no rights or obligations *vis-a-vis* defendant corporation; "Non-contributing Members" did not satisfy the requirements for membership in defendant corporation and did not knowingly take affirmative steps to become members of defendant corporation.

Interrogatory No. 11

The FEC has alleged in paragraph 9 of the Complaint that the publication "exhorted the reader to vote" for candidates opposed to abortion. Does the FEC contend that:

- a. the publication constituted a violation of law because it constituted express advocacy for federal candidates, or
- b. the publication constituted a violation of law regardless of whether or not the publication is adjudged to be express advocacy for federal candidates?

Objection To Interrogatory No. 11

The Commission objects to Interrogatory No. 11 on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 11

Without waiving its objection, the Commission answers Interrogatory No. 11 as follows:

- a. No.
- b. Yes.

Interrogatory No. 12

Please identify the complainant referred to in paragraph 16 of the Complaint.

Answer To Interrogatory No. 12

The complainant is the National Abortion Rights Action League, Inc.

Interrogatory No. 13

With respect to each oral or telephonic communication between the said complainant or anyone on behalf of NARAL and anyone on behalf of the FEC from April 1, 1979, to date, referring in any way to the subject matter of this case or the allegations made by the complainant, please:

- a. state the date and place,
- b. identify the speakers,
- c. set forth as nearly verbatim as you can what was said.

Answer To Interrogatory No. 13

No such communications have taken place.

Interrogatory No. 14

If plaintiff contends that 2 U.S.C. § 441b prohibits nonprofit corporations from making expenditures in connection with a federal election and that such prohibition serves a compelling purpose, please

- a. specify in detail what that purpose is and
- b. identify in detail every item of legislative history which plaintiff contends reveals this purpose.

Objection To Interrogatory No. 14

The Commission objects to Interrogatory No. 14 on the grounds that it asks for legal conclusions and opinions.

Answer To Interrogatory No. 14

Without waiving its objections to Interrogatory No. 14, the Commission answers as follows:

- a. The compelling purpose served by the prohibitions in 2 U.S.C. § 441b is disclosed in the legislative history pertinent to that section as well as the relevant case law, including: *United States v. CIO*, 335 U.S. 106 (1948); *United States v. Pipefitters Local No. 562*, 407 U.S. 385 (1972); and *United States v. UAW*, 352 U.S. 567 (1957).

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

/s/ R. Lee Andersen
R. LEE ANDERSEN
Attorney

May 25, 1982

Federal Election Commission
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(202) 523-5071

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

PLAINTIFF FEDERAL ELECTION COMMISSION'S
RESPONSE TO DEFENDANT'S REQUEST
FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure the Federal Election Commission (hereinafter the "Commission") submits the following response:

1. Admit.
2. Admit.
3. Admit.
4. The Commission objects to the use of the term "trial" in request No. 4. The proceeding is more properly characterized as an evidentiary hearing. Subject to this objection, the Commission admits request No. 4.
5. The Commission objects to Request No. 5 because it calls for admissions as to the truth of findings of fact made by Judge Pratt in the certification of findings of fact to the Second Circuit Court of Appeals in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, et al.*, Docket No. 78-C-1658 (E.D.N.Y. 1979). These findings reflect, in most instances, only the court's judg-

ment as to the veracity of a variety of opinions concerning the organizational purposes and operations of the American Civil Liberties Union, the New York Civil Liberties Union, the U.S. Chamber of Commerce, the United Church of Christ, Public Citizen and the New York Times. With the exception of those findings admitted below, the Commission is not in a position to have actual knowledge as to whether the court's findings are in fact true regarding the named organizations. The Commission does admit that those findings incorporated into request No. 5 are findings of fact made by Judge Pratt in that action. The Commission has made reasonable inquiry and the information known or readily obtainable by it is insufficient to enable the Commission to admit or deny the truth of the findings submitted by the defendant except as to the following:

VII

C.

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit.

D.

13. Admit.
14. Admit.

E.

20. Admit.

F.

1. Admit.
6. See Commission's response to Request No. 5.
7. With the exception of finding VII. E. 20., the Commission's response to Request No. 7 is identical to that for Request No. 5.

VII.

E.

20. Deny.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

/s/ R. Lee Andersen
R. LEE ANDERSEN
Attorney

June 23, 1982

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

SUPPLEMENTARY OBJECTIONS AND ANSWERS OF
THE FEDERAL ELECTION COMMISSION TO
INTERROGATORIES PROPOUNDED BY DEFENDANT

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Local Court Rules for the District of Massachusetts, the Federal Election Commission (hereinafter the "Commission") submits the following Supplementary Objections and Answers to Defendant's First Set of Interrogatories. As the Commission has stated previously, parts a and b of defendant's Interrogatories Nos. 2 and 3, and part a of Interrogatory No. 4 as originally drafted ask the Commission for purely legal conclusions as to the meaning of the individual terms "newspaper" and "other periodical publication that appear within the exemption of Section 431(9)(B)(i) of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (hereinafter cited as the "Act"), and the Commission continues to assert its objection to these interrogatories. However, as a result of telephone conversations held with counsel for defendant

during which defendant modified and clarified its interrogatories, it now appears that Interrogatories 2 and 3 and Interrogatory No. 4, taken in their entirety, may have been the defendants' attempt to inquire into how the law was applied to specific facts at issue in this action. The Commission, therefore, is making a supplementary response to Interrogatory No. 5 covering the application of the exemption in Section 431(9)(B)(i) of the Act to the present action.

In addition, without waiving its objections, the Commission will provide some illustrative legal background to the terms at issue in Interrogatories 2, 3, 4 and 5. The Commission continues to maintain that it should not be required to conduct defendant's legal research, but has offered this background information in the spirit of compromise embodied in Federal Local Court Rule 15(e) and to aid defendant in conducting its own legal research. Finally, the Commission has submitted a supplementary response to Interrogatories No. 6 through 9 in light of the defendant's agreement to strike the term "other publication" from these interrogatories. (See letter attached as Exhibit A).

Interrogatory No. 2

If plaintiff contends, having conducted its investigation, that the publication is not a "newspaper" as that term is used in 2 U.S.C. § 431(f)(4)(A) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present) please:

- a. state what plaintiff believes to be the definition of "newspaper" for purposes of that statute,
- b. state what source plaintiff relies upon as having provided that definition,

- c. describe in detail what features or characteristics of the said publication disqualify it from being considered a "newspaper."

Supplementary Answer To Interrogatory No. 2

See supplementary answer to Interrogatory No. 5.

Interrogatory No. 3

If plaintiff contends, having conducted its investigation, that the publication is not an "other periodical publication" as that term is used in 2 U.S.C. § 431(f)(4)(A) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present), please:

- a. state what plaintiff believes to be the definition of "other periodical publication" for purposes of that statute,
- b. state what source plaintiff relies upon as having provided that definition,
- c. describe in detail what features or characteristics of the said publication disqualify it from being considered an "other periodical publication."

Supplementary Answer To Interrogatory No. 3

See supplementary answer to Interrogatory No. 5.

Interrogatory No. 4

Does the FEC agree that the publication constitutes a newsletter?

- a. If so, set forth in detail wherein a newsletter differs from a newspaper for purposes of the exclusion from the definition of expenditure referred to in Interrogatory No. 2.

- b. If not, describe in detail what features or characteristics of the publication preclude it from being a newsletter.

Supplementary Answer to Interrogatory No. 4

See supplementary answer to Interrogatory No. 5.

Interrogatory No. 5

Please set forth each and every reason why the publication is not excluded from the definition of "expenditure" by 2 U.S.C. § 431(f)(4)(a) (as of September, 1978) or 2 U.S.C. § 431(9)(B)(i) (at present).

Supplementary Objection To Interrogatory No. 5

Insofar as the defendant is asking the Commission's view on the abstract application of law, the Commission is generally limited by statute from making advisory rulings or policy statements outside the process of promulgating regulations or rendering advisory opinions.¹ With regard to the application of the law to the specific facts of this case, the Office of General Counsel's Probable Cause Brief of August 26, 1980, reviews the features of characteristics of the defendant's September 1978 materials which disqualify it from the exemption found in Section 431(9)(B)(i). Of course, all of the supplementary answers are qualified by the fact that discovery is ongoing in this matter.

¹ "No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of [Section 437f concerning advisory opinions]." 2 U.S.C. § 437f(b).

Supplementary Answer To Interrogatory No. 5

Without waiving its objections and assuming for purposes of this answer that Interrogatories 2, 3 and 4 are subsumed under Interrogatory No. 5, the Commission submits the following answer:

(1) *General Counsel's Brief*

The General Counsel's Brief of August 26, 1980, (which was submitted to defendant shortly after that date) states that even assuming that the organization's regular newsletter could be considered to fall within the exemption in Section 431(9)(B)(i), the September 1978 materials that exhorted readers to vote for candidates opposing abortion could not. The General Counsel's Brief notes that the circulation of the materials in question was many times that of the regular newsletter and that the materials appeared to be a vehicle expressly designed to have partisan impact upon the 1978 primary election. Another factor mentioned in the brief was that the materials were circulated far in excess of the two to three thousand persons who typically received the MCFL newsletter. It is also apparent that the materials were not a periodical.

(2) *Regulations and Advisory Opinions*

Although neither the Act nor the Commission regulations define the specific terms "newspaper", "magazine" or "other periodical publication," in the context of the exemption from the definition of expenditure in Section 431(9)(B)(i), as it applies to a prohibited contribution made by a corporation, Commission regulations and advisory opinions have touched upon the Section 431(9)(B)(i) exemption, generally, in the following instances:

a. Commission regulation 11 C.F.R. § 114.4(e) describing the kind of media corporations which may defray the costs of non-partisan candidate debates without making a prohibited contribution, states:

"(e) Nonpartisan candidate debates. (1) A non-profit organization qualified under 11 C.F.R. 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under 11 C.F.R. 114.4(e)(3) to defray costs incurred in staging non-partisan candidate debates in accordance with 11 C.F.R. § 110.13.

(2) A bona fide broadcaster, newspaper, magazine and other periodical publication may use its own funds to defray costs incurred in staging nonpartisan public candidate debates held in accordance with 11 C.F.R. § 110.13.

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 C.F.R. § 110.13(a)(1) to stage non-partisan candidate debates held in accordance with 11 C.F.R. § 110.13 and 114.4(e)."

b. Commission regulation 11 C.F.R. § 100.7(b)(2) states:

"Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the cost for a news story (i) which represents a bona fide news account communicated in a publication of general circulation or

on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution."

c. Advisory Opinion 1980-109, citing the legislative history of the "news story" exemption at 2 U.S.C. § 431(9)(B)(i) of the Act in H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974), states that it is a limited exemption designed to insure the right of the media to cover and comment on election campaigns. Also in AO-1980-109, there is a reference to the meaning of the term "other periodical publication" in the exemption of Section 431(9)(B)(i) which appeared in the Explanation and Justification of the Commission's Candidate Debate Regulations at 44 *Federal Register* 76735 (December 27, 1979). Referring to Commission regulation 114.4(e), the Explanation and Justification states, in relevant part: "a publication in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, opinion or entertainment, whether of general or specialized interest which ordinarily derive their revenues from subscriptions and advertising."

(3) Other Relevant Definitions

In addition to references specific to the Act, the terms "magazine" and "periodical" have been interpreted by the courts in the context of postal service regulations, as well as bankruptcy and communications law. These interpretations have required periodicity, content aimed at the general public, dis-

cusion of a variety of issues, and some continuity or connection between successive issues. *Houghton v. Payne*, 194 U.S. 88, 96-97 (1904); *Smith v. Hitchcock*, 226 U.S.C. 53, 59 (1912); *Institute for Scientific Information, Inc. v. United States Postal Service*, 555 F.2d 128, 131 (3d Cir. 1977); *H.W. Wilson Co. v. United States Postal Service*, 580 F.2d 33, 37 (2d Cir. 1978).

In the absence of a precise statutory definition one court stated that "it is pretty generally agreed that it ("newspaper") means a medium for the dissemination of news of passing events printed and distributed at short but regular intervals." *In Re Sterling Cleaners and Dryers*, 81 F.2d 596, 597 (7th Cir. 1936). Other courts have resorted to the dictionary stating, for example, "[i]n Webster's New International Dictionary (p. 1455) a 'newspaper' is defined as a paper printed and distributed at stated intervals, usually daily or weekly, to convey news, advocate opinions, etc., now usually containing also advertisements and other matters of public interest . . ." *Cory v. Physical Culture Hotel*, 14 F. Supp. 977, 984 (1936), aff'd 88 F.2d 411 (2d Cir. 1937).

"Newspaper" has similarly been defined for purposes of federal statutes other than the Act. "Newspapers", within general accepted meanings, are publications printed on newsprint, which are published no less than weekly, a substantial portion of which are devoted to the dissemination of news and editorial opinion, and which are distributed to the general public. See Newspaper Preservation Act of July 24, 1970 (codified in 15 U.S.C. § 1802 (1979)).

Interrogatory No. 6

Has the FEC found reason to believe, or reasonable cause to believe, or probable cause to believe that any

other nonprofit corporation has made an impermissible expenditure in connection with an election by reason of material printed in that organization's newsletter, newspaper, tabloid or periodical?

Supplementary Response To Interrogatory No. 6

Without waiving its objections, the Commission submits the following answer: Yes.

Interrogatory No. 7

If your answer to the previous interrogatory is not in the negative, please:

- a. identify the nonprofit corporation by name and state of incorporation,
- b. identify the FEC's docket or file number in the case,
- c. give the date of the said finding by the FEC,
- d. give the date of each publication giving rise to the finding.

Supplementary Response To Interrogatory No. 7

Without waiving its objections, the Commission answers that it will provide defendant with list of matters under review ("MUR's") and the name of the nonprofit corporation in the matter. When the Commission responds to defendant's Request for Production of Documents, No. 5, it will provide all the information called for in Interrogatory No. 7 as well. The Commission notes that the information provided below is sufficient to permit defendant to examine the pertinent files on public record at the Commission's offices in Washington, D.C. The Commission further notes that the following list of MUR's is comprised

only of those files which have been closed as the Commission is precluded by statute from making public any open investigation of alleged violations of the Act without the written consent of the person being investigated. 2 U.S.C. § 437g(a)(12). We are continuing to search our files to determine whether any other MUR's fit into the parameters of Interrogatory No. 7 and will further supplement our response to this interrogatory with any MUR's conforming to these parameters.

1. MUR 959—The Right to Life Committee of New Mexico, Inc.
2. MUR 1183—The Family Life League, Inc.
3. MUR 1377—Planned Parenthood Affiliates of California, Inc.

Interrogatory No. 8

Has the FEC brought any court action against any nonprofit corporation alleging that the corporation has made an impermissible expenditure in connection with an election by reason of material printed in that organization's newsletter, newspaper, tabloid or periodical?

Supplementary Response To Interrogatory No. 8

Without waiving its objections, the Commission submits the following answer: Yes.

Interrogatory No. 9

If your answer to the previous interrogatory is not in the negative, please:

- a. identify the nonprofit organization, by name and state of incorporation,

- b. state the title or caption of the case,
- c. identify the court in which the action was brought, giving the docket number,
- d. state whether or not there has been any determination by the court on the merits of the FEC's contention, and, if so, what date the court determination was entered.

Supplementary Response To Interrogatory No. 9

Without waiving its objections, the Commission answers that a search of our files reveals that the Commission has brought one court action fitting the parameters of Interrogatory No. 9. In addition, we are continuing to search our files to determine whether any other court actions fit into the parameters of Interrogatory No. 9 and will supplement our response to this interrogatory with any such court actions conforming to these parameters.

- a. Liberty Lobby, Inc., District of Columbia
- b. *Federal Election Commission v. The Spotlight and Liberty Lobby, Inc.*, Civ. Action no. 78-1544 (D.D.C. filed August 17, 1978).
- c. See response to b.
- d. Consent Order approved by court June 28, 1982.

Respectfully submitted,

/s/ Charles N. Steele (LMN)
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
 LAWRENCE M. NOBLE
 Assistant General Counsel

/s/ R. Lee Andersen
 R. LEE ANDERSEN
 Attorney

June 30, 1982

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UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT

AFFIDAVIT OF PHILIP D. MORAN

I, Philip D. Moran, hereby depose and state:

1. My name is Philip D. Moran. I have been a member of Massachusetts Citizens for Life, Inc. ("MCFL") since its incorporation. I was one of the incorporators of MCFL. I am, and since 1979 have been, a member of the Executive Committee of MCFL. Also, I am, and since 1973 have been, a director of MCFL. I have personal knowledge of the matters stated herein.

Incorporation and Statement of Purpose

2. MCFL grew out of an Ad Hoc Committee organized in September, 1972 to fight a permissive abortion referendum in 21 Massachusetts cities and towns.

3. In January, 1973 MCFL was incorporated as a nonprofit, grass roots, nonsectarian, nonpartisan, non-stock corporation under Mass. Gen. Laws c.180. As stated in its Articles of Organization, a copy of which

is attached hereto as *Exhibit A*, MCFL's corporate purpose was

To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized

MCFL also adopted a somewhat longer version of this language as its "Statement of Purpose;" that Statement reads

In recognition of the fact that each human life is a continuum from conception to natural death, the objective of this organization is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity.

4. From time to time throughout this affidavit specific dates or years will be referred to. At other times, I will use the present tense. The present tense should be understood as referring to September, 1978, and earlier; use of this tense is merely for convenience or reference.

Membership and Fund Raising

5. From its incorporation, through 1978, MCFL recognized as a member any person who had signified his or her agreement with MCFL's Statement of Purpose.

6. MCFL's records kept in the ordinary course of its operations indicate that by 1978 MCFL claimed approximately 57,000 members.

7. MCFL's records kept in the ordinary course of its operations further indicate that in 1978 some 5,986 of these members were contributing or dues-paying members.

8. During the period 1973-1978, MCFL also raised funds through such activities as garage sales, cake sales, bike-a-thons, fashion shows, brunches, picnics, yard sales, dinners, dances, raffles, auctions, furniture sales, wine-testing parties, MCFL night at the Boston Pops, MCFL night at the Red Sox, flower sales, and cookbook sales.

9. All of the funds raised by MCFL during the period 1973-1978, whether from dues or through contributions or other activities, came from individuals; none came from corporations.

10. No portion of the contributions, dues, or funds raised by MCFL during the period 1973-1978 is earmarked for specific political activities or for particular candidates. They were used to cover administrative costs, the printing and distribution of educational materials and the MCFL newsletter.

MCFL Activities: Educational

11. Since its inception in 1972, MCFL has engaged in a wide range of activities designed to foster the respect for human life and to defend the right to life of all human beings, born and unborn. During the period 1973-1978, these activities focused on the following subjects, among others: abortion, euthanasia and living will legislation, pregnancy disability legislation, armed services regulations limiting the number of dependents of armed services personnel, experimentation on fetuses, the equal rights amendment, and *in vitro* fertilization.

12. Many of MCFL's activities are educational. For example, during the period 1973-1978, it partici-

pated in and provided speakers for discussion groups, forums, debates, lectures, educational booths, colleges, youth organizations, fairs, banquets, community forums, expositions, hearings, churches, synagogues; it also participated in radio and TV broadcasts, all on pro-life issues. In 1978 alone, for example, it made 149 such presentations.

13. Similarly, during the period 1973-1978, MCFL organized numerous gatherings of pro-life supporters to bear witness to their pro-life position. In 1974, it organized an ecumenical prayer service for the unborn in front of the State House attended by 2,200 persons; it hosted the first New England pro-life conference held at Framingham and attended by 350 persons from six states. Each year during this period, on or about January 22, the anniversary of the Supreme Court's decision in *Roe v. Wade*, it sponsored a March for Life which proceeded from Faneuil Hall to the State House. During this same period it also organized numerous Walks for Life and Festivals for Life.

14. In addition to providing speakers, publishing advertisements and organizing gatherings, MCFL also promoted the flow of information on pro-life issues by distributing pro-life literature. In 1978, it distributed many pieces of literature on pro-life issues. It also has distributed the MCFL Newsletter since 1973. Further, in April, 1976, it initiated a 24-hour telephone recording which provides up-to-date information on pro-life issues and MCFL activities.

MCFL Activities: Legal

15. During this same period, MCFL also sponsored a variety of legal activities. Somewhere be-

tween 1974 and 1978, it contributed funds towards the defense of the constitutionality of the clause requiring parental consent in the Massachusetts abortion statute.

MCFL Activities: Political and Legislative

16. MCFL has also engaged in a variety of political and legislative activities during 1973-1978. It drafted and submitted various legislation on pro-life issues. In 1974, for example, it drafted and submitted two bills which became law in Massachusetts: one prohibited harmful experimentation on live fetuses (H. 6019); the other was designed to protect unborn children and maternal health (H. 5933). It also sponsored testimony against a bill promoting euthanasia and filed a memorialization petition seeking a formal expression from the Massachusetts Senate to Congress with respect to federal legislation amending the Bill of Rights to establish the rights of the unborn.

17. Similarly, during the period 1973-1978, editions of the MCFL newsletter consistently urged members to register, to vote, and to write to elected representatives on the subject of upcoming votes, hearings and elections. Central to its political activities was the effort to educate its members through newsletters reporting on a candidate's voting record or his responses to questions on pro-life issues.

18. During the period 1973-1978 MCFL also engaged in marches and picketing to secure pro-life platforms at political gatherings and in lobbying of elected representatives on pro-life issues.

MCFL Newsletter: History

19. During the period 1973-1978, the primary avenue of communication among MCFL and its mem-

bers was the MCFL Newsletter. It dated back to the very inception of MCFL; the first edition was published in January, 1973, the month when MCFL was incorporated. Thereafter, through 1978, the MCFL Newsletter was distributed relatively regularly (1973: 3 times; 1974: 5 times; 1975: 8 times; 1976: 8 times; 1977: 5 times; 1978: 4 times), the lapses were usually attributable to insufficient funds. Copies of all MCFL newsletters printed during the period 1973-1978 are attached hereto as *Exhibit B*.

20. During the period 1973-1978 contributing members automatically received the MCFL Newsletter by mail. In addition, at various times the MCFL Newsletter was mailed or distributed to all MCFL members.

21. During the period 1973-1978 MCFL paid all expenses for the preparation, printing and distribution of the MCFL Newsletter. These costs were met through the contributions, dues and fund raising activities described above in paragraphs 7-8.

22. During 1973-1978 the MCFL Newsletter was prepared entirely by MCFL members, some of whom were paid staff persons.

23. During the period 1973-1978 the MCFL Newsletter typically contained information on both past and upcoming MCFL activities and appeals for volunteers and contributions. It also included material on political, administrative, judicial and legislative developments, such as the results of hearings on bills and constitutional amendments before legislative committees, the status of particular legislation, the outcome of referenda, developments in court cases, and the results of hearings before administrative agencies. These reports were usually coupled with appeals urging MCFL members to write or call the decision-

makers and voice their support of the pro-life position. The MCFL Newsletter often also contained reports on the media, as well as excerpts from articles in local and national newspapers and profiles or opinions of individuals active in the pro-life cause.

MCFL Activities: Purpose in Organizing

24. Almost all of the activities described in paragraphs 12 to 23 above were, during the period 1973-1978, accomplished by MCFL members, most of whom were volunteers. In 1978, MCFL had only two paid staff persons. (Both of them were MCFL members.)

25. Many of the MCFL volunteers and members are individuals who were not previously involved in political or legislative affairs.

26. From the start MCFL sought to increase the number of members and the numbers of chapters for the purpose of being heard in the political arena. In the first year after MCFL's incorporation, in its September, 1973 MCFL Newsletter, a copy of which is attached as *Exhibit C*, MCFL noted:

Our goal is to form MCFL chapters in every city and town in Massachusetts and to gain as many members as we can. * * * Our purpose in seeking these goals is to build up the strength necessary to move for appropriate action our congressmen in whose hands are contained our chances of fulfilling our ultimate goal—a mandatory constitutional amendment [securing the right to life].

MCFL Newsletter at 3 (Vol. 1, No. 3, September, 1973).

27. MCFL also early recognized the importance of communication to fulfill these organizational goals. In the October, 1974 MCFL Newsletter, a copy of which is attached as *Exhibit D*, it noted.

It is true that in order to obtain our goal of a mandatory constitutional human life amendment . . . , it is most necessary to build a strong political base [T]his end cannot be achieved unless we can raise the money that is vitally needed to support our organization Among the many financial needs MCFL has is money for communication purposes. The cost of telephone and newsletters . . . make up some of our biggest bills. *Without frequent communication no organization can operate effectively*, and without money there can be no adequate state-wide communication * * * In numbers there is strength

MCFL Newsletter at 1-2 (Vol. 2, No. 4, October, 1974) (emphasis added). Also, in the minutes of the May 4, 1973 meeting of the executive board of the Board of Directors and the chapter training session, attached hereto as *Exhibit E*, it says

Again, it was pointed out that an efficient communications network is absolutely essential to the organization—both on the local and state levels. The function of the main office lies in correlating and disbursing important information but it cannot be stressed too clearly that *MCFL is not the Office in Newton but, rather it is the individuals within the framework of the organization.*

Minutes of Board of Directors/Chapter Chairman Training Meeting, May 4, 1973 at 1 (emphasis added).

Administrative Proceedings

28. In July, 1979, MCFL received notice from the Federal Election Commission ("FEC") that it had determined there was reason to believe that MCFL had violated 2 U.S.C. § 441b. A copy of that notice is attached hereto as *Exhibit F*.

29. In August, 1980, MCFL received a copy of the FEC's "Probable Cause Brief." A copy of that brief is attached hereto as *Exhibit G*.

Signed and sealed under the pains and penalties of perjury this 9th day of July, 1982.

/s/ Philip D. Moran

Then appeared before me the above-named Philip D. Moran, known to me, and, having been by me duly sworn, stated that he had read and executed the foregoing affidavit and that the contents thereof were true to the best of his knowledge.

/s/ Lesley-Elizabeth Tucker
Notary Public

My Commission Expires:
2 April 1987

EXHIBIT A

THE COMMONWEALTH OF MASSACHUSETTS

JOHN F. X. DAVOREN

Secretary of the Commonwealth

State House

Boston, Mass. 02133

ARTICLES OF ORGANIZATION

(Under G.L. Ch. 180)

Incorporators

NAME

RESIDENCE

Include given name in full in case of natural persons; in case of corporation, give state of incorporation.

PHILIP D. MORAN, 10 Verona Street, Lynn, Mass.
01904

The above-named incorporator(s) do hereby associate (themselves) with the intention of forming a corporation under the provisions of General Laws, Chapter 180 and hereby state(s) :

1. The name by which the corporation shall be known is:

MASSACHUSETTS CITIZENS FOR LIFE,
INC.

NOTE: If provisions for which the space provided under Articles 2, 3 and 4 is not sufficient, additions should be set out on continuation sheets to be numbered 2A, 2B, etc. Indicate under each Article where the provision is set out. Continuation sheets shall be on 8½" x 11" paper and must have a left-hand margin 1 inch wide for binding. Only one side should be used.

2. The purposes for which the corporation is formed are as follows:

To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized under Chapter 180 of the General Laws of the Commonwealth of Massachusetts.

If the corporation has more than one class of members, the designation of such classes, the manner of election or appointment, the duration of membership and the qualification and rights, including voting rights of the members of each class, are as follows:—

NONE

Other lawful provisions, if any, for the conduct and regulation of the business and affairs of the corporation, for its voluntary dissolution, or for limiting, defining, or regulating the powers of the corporation, or of its directors or members, or of any class of members, are as follows:—

NONE

5. By-laws of the corporation have been duly adopted and the initial officers, president, treasurer and clerk or other presiding, financial or recording officers whose names are set out below, have been duly elected.
6. The effective date of organization of the corporation shall be the date of filing with the Secretary of the Commonwealth or if later date is desired,

specify date, (not more than 30 days after date of filing.)

7. The following information shall not for any purpose be treated as a permanent part of the Articles of Organization of the corporation.

a. The post office address of the initial principal office of the corporation in Massachusetts is:

430 Centre Street, Newton, Massachusetts
02158

b. The name, residence, and post office address of each of the initial directors and following officers of the corporation are as follows:

Name	Residence	Post Office Address
------	-----------	---------------------

President: Roy Scarpato,	30 Rolling Lane,	Wayland, Mass. 01778.
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Treasurer: Richard Carey,	430 Centre St.,	Newton, Mass. 02158
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Clerk: Philip D. Moran,	10 Verona St.,	Lynn, Mass. 01904.
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Directors: (or officers having the powers of directors)

Roy Scarpato,	30 Rolling Lane,	Wayland, Mass. 01778.
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Richard Carey,	430 Centre St.,	Newton, Mass. 02158.
----------------	-----------------	----------------------

Philip D. Moran,	10 Verona St.,	Lynn, Mass. 01904
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Jean Svagsdys,	37 May Ave.,	Brockton, Mass.
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Patricia Lally,	22 Tucker Terrace,	Randolph, Mass. 02362.
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Frank O'Connor,	56 Prospect St.,	Shrewsbury, Mass. 01545.
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Irving E. Kane,	24 Longbow Circle,	Lynnfield, Mass. 01940.
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Mary Young,	16 Marlboro St.,	Newton, Mass. 02158.
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c. The date initially adopted on which the corporation's fiscal year ends is:

December 31st.

d. The date initially fixed in the by-laws for the annual meeting of members of the corporation is:

Fourth Friday in January.

e. The name and business address of the resident agent, if any, of the corporation is:

None.

IN WITNESS WHEREOF and under the penalties of perjury the above-named INCORPORATOR(S) sign(s) these Articles of Organization this 21st day of January 1973.

/s/ [Illegible]

The signature of each incorporator which is not a natural person must be [illegible].

THE COMMONWEALTH OF MASSACHUSETTS

ARTICLES OF ORGANIZATION
GENERAL LAWS, CHAPTER 180

I hereby certify that, upon an examination of the within-written articles of organization, duly submitted to me, it appears that the provisions of the General Laws relative to the organization of corporations have been complied with, and I hereby approve said articles; and the filing fee in the amount of \$30.00 having been paid, said articles are deemed to have been filed with me this 26th day of January, 1973.

Effective date

/s/ John F. X. Davoren
JOHN F. X. DAVOREN
Secretary of the
Commonwealth

TO BE FILLED IN BY CORPORATION
CHARTER TO BE SENT TO

599-1905

PHILIP D. MORAN, ESQUIRE

10 Verona Street

Lynn, Massachusetts 01904

Filing Fee: \$30.00 CHARTER MAILED Illegible
" DELIVERED Illegible

Lynn, Newton & Wayland 1-30-73

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT

AFFIDAVIT OF MARIANNE REA-LUTHIN

I, Marianne Rea-Luthin, hereby depose and state:

1. My name is Marianne Rea-Luthin. I am, and since 1973, have been a member of Massachusetts Citizens for Life, Inc. ("MCFL"). I am currently president of MCFL.

2. From approximately July to October, 1978 I was executive director of MCFL. In 1978 I was the editor of the special election editions of the MCFL newsletter described below in ¶¶ 8-19. I had final responsibility for the content and layout of those editions. I have personal knowledge of the matters stated herein.

MCFL Newsletter: History

3. During the period 1973-1978, the primary avenue of communication among MCFL and its members was the MCFL Newsletter. It dates back to the very inception of MCFL; MCFL's records kept in the ordinary course of its business indicate that the first

edition was published in January, 1973, the month when MCFL was incorporated. Those records indicate that thereafter, through 1978, the MCFL Newsletter was distributed relatively regularly (1973: 3 times; 1974: 5 times; 1975: 8 times; 1976: 8 times; 1977: 5 times; 1978: 4 times), the lapses were usually attributable to insufficient funds. Copies of all MCFL newsletters printed during the period 1973-1978 are attached to the Affidavit of Philip D. Moran as *Exhibit B*.

4. During the period 1973-1978 contributing members automatically received the MCFL Newsletter by mail. In addition, at various times the MCFL Newsletter was mailed or distributed to all MCFL members.

5. During the period 1973-1978 MCFL paid all expenses for the preparation, printing and distribution of the MCFL Newsletter. These costs were met through contributions and dues paid to MCFL and its fund raising activities. During the period 1973-1978, these fund-raising activities included activities such as garage sales, cake sales, bike-a-thons, fashion shows, brunches, picnics, yard sales, dinners, dances, raffles, auctions, furniture sales, wine-tasting parties, MCFL night at the Boston Pops, MCFL night at the Red Sox, flower sales, and cookbook sales.

6. During 1973-1978, the MCFL Newsletter was prepared entirely by MCFL members, some whom were paid staff persons.

7. During the period 1973-1978 the MCFL Newsletter typically contained information on both past and upcoming MCFL activities and appeals for volunteers and contributions. It also included material on political, administrative, judicial and legislative developments, such as the results of hearings on bills and constitutional amendments before legislative

committees, the status of particular legislation, the outcome of referenda, developments in court cases, and the results of hearings before administrative agencies. These reports were usually coupled with appeals urging MCFL members to write or call the decisionmakers and voice their support of the pro-life position. The MCFL Newsletter often also contained reports on the media, as well as excerpts from articles in local and national newspapers and profiles or opinions of individuals active in the pro-life cause.

MCFL Newsletter: Special Election Editions

8. During 1973-1978, in periods prior to elections, MCFL regularly printed "Special Election Editions" of the MCFL newspaper. The first such "Special Election Edition" was printed in September, 1974; two other such editions were printed before September, 1978.

9. The "Special Election Editions" referred to in the preceding paragraph included information on candidates' positions on certain issues. The publication of the position of the candidates was intended as an educational service for concerned voters, not as an endorsement of particular candidates. It began in response to a deluge of inquiries to the MCFL office for information concerning the position of candidates on pro-life issues.

10. In September, 1978, MCFL published a "Special Election Edition" of the MCFL Newsletter. A copy of that edition is attached hereto as *Exhibit A*.

11. The September, 1978 "Special Election Edition" disseminated information on the voting records and responses to questionnaires of candidates running in the September 19, 1978 primary. The Newsletter

states that the "[MCFL] election survey is an educational service to help you cast an informed vote when you go to the polls" Special Election Edition at 1.

12. The "Special Election Edition" referred to 50 candidates for federal office and 442 candidates for state office. It reported their positions on three central pro-life issues: (1) a "constitutional Human Life Amendment," (2) legislation to prohibit the use of tax funds for abortions, and (3) legislation to provide positive alternatives to abortion. The positions of the incumbents were determined by reference to roll call votes; the positions of the non-incumbents were determined by responses to MCFL questionnaires.

13. Shortly thereafter, MCFL printed and distributed a partial "Special Election Edition" of the MCFL Newsletter. A copy of this partial "Special Election Edition" is attached hereto as *Exhibit B*. It was printed for the sole purpose of correcting minor errors in the earlier full Edition's reporting of the voting records of Congressmen Tsongas, Studds and Drinan.

14. I, and one other MCFL member, Anne Fox, edited and prepared both the September, 1978 "Special Election Edition" and the partial "Special Election Edition."

15. In compiling the voting records of the incumbent federal candidates listed on p. 2 and 7 of the "Special Election Edition," we used records of votes printed in the *Congressional Quarterly* and the *Congressional Record*. We did not communicate with the incumbent federal candidates, their campaign workers or their political committees with respect to the text of either edition or their distribution.

16. In determining the positions of the non-incumbent federal candidates listed on p. 2, 7 and 8 of the "Special Election Edition," MCFL sent each such candidate a questionnaire and a cover letter in the form attached hereto as *Exhibit C* and *D*, respectively. In addition, in cases when the questionnaire was not returned to MCFL, we made follow-up telephone calls for the purpose of confirming the receipt of the questionnaire. We had no other communications with the non-incumbent candidates, their campaign workers or their political committees with respect to the text of either edition or their distribution.

17. We made no arrangements with any federal candidates listed in either edition or with their campaign workers or political committees to coordinate or prearrange the preparation of the newsletter. Both editions specifically note that "[t]his special election edition does not represent an endorsement of any particular candidate."

18. The approximate total cost of the preparation, printing and distribution of the "Special Election Edition" and the partial "Special Election Edition" was approximately \$9,812.76.

19. The cost of the preparation, printing and distribution of the "Special Election Edition" and the partial "Special Election Edition" were borne entirely by funds contributed or donated to MCFL or raised by it in the manners set forth in ¶ 5 above. No candidate, political or campaign committee, and no corporation contributed any money used to defray the costs of preparing, printing, or distributing the two editions.

20. If, in my capacity as editor of the MCFL newsletter in 1978, I had had to determine whether a phrase or word used in association with a candi-

date in a newsletter was "like" or "similar" to the following phrases: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject," in order to avoid violation of federal laws, I would have been so uncertain of what other phrases or implications might be encompassed, that I would substantially cut back the contents of the feature or story in question.

Signed and sealed under the pains and penalties of perjury this 12th day of July, 1982.

/s/ Marianne Rea-Luthin

Then appeared before me the above-named Marianne Rea-Luthin, known to me, and, having been by me duly sworn, stated that she had read and executed the foregoing affidavit and that the contents thereof were true to the best of her knowledge.

/s/ Ramona Albino
Notary Public

My Commission Expires: 3/4/88

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT

AFFIDAVIT OF ANNE FOX

I, Anne Fox, hereby depose and state:

1. My name is Anne Fox. I am, and since 1973, have been a member of Massachusetts Citizens for Life, Inc. ("MCFL"). I have personal knowledge of the matters stated herein.

2. In September, 1978, MCFL published a "Special Election Edition" of the MCFL Newsletter. A copy of that edition is attached hereto as *Exhibit A*.

3. The September, 1978 "Special Election Edition" disseminated information on the voting records and responses to questionnaires of candidates running in the September 19, 1978 primary. The Newsletter states the "[MCFL] election survey is an educational service to help you cast an informed vote when you go to the polls" Special Election Edition at 1.

4. The "Special Election Edition" referred to 50 candidates for federal office and 442 candidates for state office. It reported their positions on three central pro-life issues: (1) a "constitutional Human Life

Amendment," (2) legislation to prohibit the use of tax funds for abortions, and (3) legislation to provide positive alternatives to abortion. The positions of the incumbents were determined by reference to roll call votes; the positions of the non-incumbents were determined by responses to MCFL questionnaires.

5. Shortly thereafter, MCFL printed and distributed a partial "Special Election Edition" of the MCFL Newsletter. A copy of this partial "Special Election Edition" is attached hereto as *Exhibit B*. It was printed for the sole purpose of correcting minor errors in the earlier full Edition's reporting of the voting records of Congressmen Tsongas, Studds and Drinan.

6. I, and one other MCFL member, Marianne Rea-Luthin, edited and prepared both the September, 1978 "Special Election Edition" and the partial "Special Election Edition."

7. In compiling the voting records of the incumbent federal candidates listed on p. 2 and 7 of the "Special Election Edition," we used records of votes printed in the *Congressional Quarterly* and the *Congressional Record*. We did not communicate with the incumbent federal candidates, their campaign workers or their political committees with respect to the text of either edition or their distribution.

8. In determining the positions of the non-incumbent federal candidates listed on p. 2, 7 and 8 of the "Special Election Edition," MCFL sent each such candidate a questionnaire and a cover letter in the form attached hereto as *Exhibit C* and *D*, respectively. In addition, in cases when the questionnaire was not returned to MCFL, we made follow-up telephone calls for the purpose of confirming the receipt of the questionnaire. We had no other commu-

nications with the non-incumbent candidates, their campaign workers or their political committees with respect to the text of either edition or their distribution.

9. No arrangements with any federal candidates listed in either edition or with their campaign workers or political committees to coordinate or prearrange the preparation of the newsletter. Both editions specifically note that "[t]his special election edition does not represent an endorsement of any particular candidate."

Signed and sealed under the pains and penalties of perjury this — day of July, 1982.

[unexecuted]

Then appeared before me the above-named Anne Fox, known to me, and, having been by me duly sworn, stated that she had read and executed the foregoing affidavit and that the contents thereof were true to the best of her knowledge.

[unexecuted]

Notary Public

My Commission Expires:

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

DEPOSITION of PHILIP D. MORAN, a witness called on behalf of the Plaintiff, taken pursuant to the Federal Rules of Civil Procedure, before Ralph J. Simpson, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the U.S. Customs House Courtroom, 13th Floor, No. 2 India Street, Boston, Massachusetts, on Thursday, August 10, 1982, commencing at 12:15 p.m.

PRESENT:

R. Lee Andersen, Esq. and Lawrence M. Noble, Esq., Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463, for the Plaintiff.

Bingham, Dana & Gould (by Francis H. Fox, Esq.), 100 Federal Street, Boston, Massachusetts 02110, for the Defendant and the deponent.

.

[22] A. I'm not aware of any.

*Q. Notwithstanding the provision in the 1973 articles of organization that we discussed under Par-

agraph No. 3, did MCFL have a policy with respect to membership during that period of time?

A. Yes.

MR. FOX: You mean written policy or are you asking for his observations of how they may have handled membership? I'd like it to be clear.

MR. ANDERSEN: My first question is as an observation is he aware of whether or not there was a policy, written or not.

MR. FOX: I guess I will object. I don't mind his telling you what he's observed and I don't mind him telling you about a written policy that he knows exists or has seen, but I don't want him making policy right here on the spot by answering your question.

MR. ANDERSEN: Could you read that question back that I asked?

*(Record read)

MR. FOX: Having said whatever I just said, my objection is to the ambiguity in the question.

MR. ANDERSEN: Are you directing— [23] occurred initially and then we were referring to when the class was differentiated to three groups. That's what I thought you responded to.

A. The best of my knowledge, my response was I don't know who proposed it, and then I don't know what the next question was.

MR. FOX: I'm not saying I know the facts are contrary. I'm saying I'm not sure that there were indeed three classes for that whole period of time, but you can clear that up.

Q. Let's start with the dues-paying members. What were the rights of dues-paying members?

A. When?

Q. We're talking about the period between 1973 and 1978.

A. As I indicated, initially there was class and that would include anyone who made a contribution or anyone who accepted the corporate purpose, and at some point in time there was a differentiation made between dues-paying members, contributing members and general members, and that differentiation was that the Massachusetts Citizens for Life indicated that if you paid \$15, you were entitled to receive—in addition to whatever [24] a good place to break because I do want to ask you some questions that will take some time.

(Short recess)

Q. I'd like to refer back to a discussion a few moments ago concerning the possibility that MCFL considered filing as a 501C(4) group. Was the filing of—this is during the period between '73 and '78. Was filing a 501C(4) tax form discussed by the board?

A. Yes.

Q. Did the board ever adopt a resolution to make such a filing?

MR. FOX: Back in '78 and earlier?

MR. ANDERSEN: Between '73 and '78.

A. My only recollection of the discussion was whether in fact a form 501C(4) had been filed, and there was some controversy as to whether it had or had not.

Q. But you did not assist in filling out the form, did you?

A. No, I had nothing to do with it.

Q. On the board of directors prior to 1978, how was the board of directors selected during that period of time?

[25] A. At the annual meeting certain people would be elected for three-year periods—initially I believe everyone was just elected for a year, and then they would resign and other people would be recommended who in fact would be willing to serve, and there would be an election. At some point in time there was I believe it was either a policy or a policy change or bylaw change that one-third of the members would be elected for a three-year period, one-third for a two-year period and one-third for a one-year period so that there would be a continuum or continuity of directors.

Q. Was the voting for the officers and board of directors open to the membership?

A. No.

Q. Who voted for directors?

A. The directors.

Q. Was this changed under the 1980 articles of organization?

A. Yes.

Q. Is the vote for the board of directors now open to a vote of the members under the articles of organization post 1980?

A. The dues-paying members.

[26] Q. During the period 1973 to 1978, how many classes of members do you understand MCFL to have had?

A. Well, as I stated earlier, initially there was one class, and then at some point in time, and I don't know when, there was dues-paying members and then there were contributing members and there were general members. So I guess the answer is specifically three.

Q. Are you saying that initially there was just one class?

A. Yes.

Q. And what did one have to do to become a member of that class of members?

A. Accept the statement of purpose of Massachusetts Citizens for Life and indicate that acceptance somehow or other in one form or another.

Q. Do you recall who established that initial class?

A. The people who incorporated the corporation.

Q. Was that the board of directors?

A. Yes.

Q. What became the board of directors.

A. Yes.

[27] Q. Was it the board of directors that then differentiated that class into the dues-paying, contributing and non-contributing members?

A. I believe it was, yes.

Q. Do you recall whether you participated in discussions concerning that question of who could be considered a member of MCFL?

A. Initially?

Q. Start with initially.

A. Yes.

Q. Do you recall who proposed differentiating the one class into the three?

A. I don't know who proposed it, no.

Q. Do you recall whether you thought this was a good idea at the time?

A. Yes.

Q. So you supported that decision to have three classes during the 1973 to 1978 period.

A. At some point in time I supported it.

MR. FOX: I'm not clear that's an accurate question, the factual assumptions. He said initially, and I don't know that he meant right up through '78.

Q. I thought we had a response to what had [28] occurred initially and then we were referring to when the class was differentiated to three groups. That's what I thought you responded to.

A. The best of my knowledge, my response was I don't know who proposed it, and then I don't know what the next question was.

MR. FOX: I'm not saying I know the facts are contrary. I'm saying I'm not sure that there were indeed three classes for that whole period of time, but you can clear that up.

Q. Let's start with the dues-paying members. What were the rights of dues-paying members?

A. When?

Q. We're talking about the period between 1973 and 1972.

A. As I indicated, initially there was one class and that would include anyone who made a contribution or anyone who accepted the corporate purpose, and at some point in time there was a differentiation made between dues-paying members, contributing members and general members, and that differentiation was that the Massachusetts Citizens for Life indicated that if you paid \$15, you were entitled to receive—in addition to whatever [29] membership benefits accrued to one, you were entitled to receive the National Right To Life News.

*Q. What other memberships (sic) accrued to that group of persons?

A. None that I'm aware of.

MR. FOX: Would you read that question for me, please?

*(Record read)

Q. It should have been what other benefits accrued to that group of persons.

A. Well, a member of Mass. Citizens could come to any board meeting. He could become part of any social function or any fund-raising event or whatever else they did.

Q. Could a member of the general public come to a board meeting?

A. As long as he was invited by one of the members, a member.

Q. Could a member of the general public come to a fund-raising activity?

A. Yes.

Q. Again referring to the dues-paying members, whenever they were established during the period of 1973 to '78, what were their duties to MCFL?

[30] A. None.

Q. Considering the group that we're calling contributing members during that period 1973 to 1978, did that group of persons receive the National Right To Life News? Excuse me. The MCFL Newsletter?

A. To the best of my knowledge, yes.

Q. Did that group of persons receive the National Right To Life Committee News?

A. Not through Mass. Citizens. Excuse me. One other benefit that did go to dues-paying members was that they received Massachusetts Citizens for Life newsletters, newspapers.

Q. Again considering talking about the contributing members, did they receive any other benefits from MCFL?

A. Other than receiving the newspaper?

Q. The newsletter.

A. And whatever else, whatever other benefits, the same benefits. They received the same benefits as the dues-paying members except that they did not receive a copy of the National Right to Life News through Massachusetts Citizens for Life.

Q. Thank you. Did they have any duties to MCFL?

[31] A. No.

Q. Let's consider the third group of non-contributing members. What benefits accrued to them through their membership in MCFL?

A. The same benefits that accrued to the other two, and other than a newspaper or newsletter, except sometimes when we could afford to send it to the overall membership, we would send it, the newsletter to everybody who we considered a member.

Q. Do you know which of the newsletters were sent to the entire group?

A. I know that the—do I have personal knowledge of which newsletters were sent? The answer is no.

Q. Are there records of which newsletters were sent to the entire group?

A. To the best of my knowledge, yes.

Q. Who would be the person that maintains those records at MCFL?

A. The current executive director.

Q. Were the differentiations in classes during the period '73 to '78, whenever it was that the differentiation began, was that a policy that was voted upon by the board of directors?

[32] A. I honestly don't know.

Q. I want to direct your attention to Exhibit A, Page 3, Paragraph 5.

MR. ANDERSEN: Off the record.

(Discussion off the record)

Q. Paragraph 5 on Page 3, Exhibit A, states that, "From its incorporation, through 1978, MCFL recognized as a member any person who had signified

his or her agreement with MCFL's statement of purpose"; is that correct?

A. Yes.

Q. Did the board of directors make the decision to adopt this as a way to recognize as a member any given person?

A. It's my belief, yes.

Q. Were you, as an original incorporator and an original director, a person who voted for this procedure described in Paragraph No. 5?

A. If indeed there was a vote, I voted for it.

Q. Under this policy, who had the responsibility of judging whether a person had signified such agreement?

A. The executive director.

Q. Did the executive director personally make [33] decisions on each potential member?

A. No.

Q. This was rather the policy then of MCFL and could be executed by any member of the board of directors?

A. I don't understand your question.

Q. What persons in the organization had the authority to recognize a person who had made a statement agreeing with MCFL's statement of purpose as a member?

A. It was our policy that any person who signified his or her agreement with the statement of purpose was automatically a member. The executive director kept a record of those people so that in fact we could disseminate information to them.

Q. But there was not necessarily a record of their statement signifying agreement with MCFL's purpose; is that correct?

A. There was some record of some agreement with the statement of purpose.

Q. Have these records been maintained?

A. I don't know.

Q. So this would be a matter the current executive director would have personal knowledge of, [34] whether or not the records had been maintained?

A. I don't know what the current executive director has a personal knowledge of or not.

Q. Referring now on Page 3 of Exhibit A, Paragraphs 5, 6 and 7 essentially state that of 57,000 members, contributing or dues-paying members numbered 5,936; is that correct?

A. That's correct.

MR. ANDERSEN: I have here "ANSWERS AND OBJECTIONS OF MASSACHUSETTS CITIZENS FOR LIFE, INCORPORATED TO INTERROGATORIES PROPOUNDED BY FEDERAL ELECTION COMMISSION" dated the 6th day of May, 1982 signed by Henry C. Luthin. I'd like to have this marked as Exhibit D.

(Commission Moran Exhibit D marked for identification).

Q. Would you please take a look at that and tell me if you're familiar with it at all?

A. I've never seen this before.

Q. Did you assist in the preparation of the MCFL response to the Commission's interrogatories?

A. No. Not these interrogatories.

Q. I direct your attention to Page 15 of Exhibit D, No. 21b. The statement is that "MCFL [35] determined that a person agrees with its statement of purpose when such person so signifies through signing forms, coupons, or petitions or through oral

communications with MCFL." Would the witness agree that that's a fair statement of the policy with respect to membership during the period 1973 to '78?

A. Yes.

Q. Do you know of any additional ways that MCFL used to determine during that period whether a person agreed with their statement of purpose?

A. Other than the four that are mentioned here?

Q. That's right.

A. I'm not familiar with any other.

MR. FOX: There would be a letter, I suppose.

MR. ANDERSEN: In the production of documents that MCFL has made to the Commission, we have a variety of newsletters and some forms. Actually also in the attachments to your affidavit are a variety of materials from MCFL. I'd like the court reporter to mark this as Exhibit E.

(Commission Moran Exhibit E marked for identification).

Q. Would you review that, please.

[36] A. Okay.

Q. Is this an example of a form for membership?

A. I would consider it an example of a form for membership.

Q. How would a person first obtain one of these forms?

A. In a variety of ways. They could pick one up from a member. They could pick one up at a booth, for example, at the Marshfield or Topsfield Fair. They could pick one up in the office.

Q. Has MCFL used a variety of forms similar to Exhibit E?

A. There have been more than one, but I have no idea how many we have used.

Q. What would be the next step then in becoming a member through signing a form?

A. The next step for the corporation?

Q. The next step for a potential member.

A. They would have to do nothing other than send this to the corporation and then they would be placed on a mailing list of the corporation.

Q. If at that point they had not sent in any money whatsoever, would their membership have been segregated from those persons who might have sent [37] this form in with a check for some amount of money?

A. It's my belief it would be.

Q. And those that sent in \$15 or more and those that sent in some amount of money less than \$15 would also have been segregated?

A. That's my understanding, yes.

Q. And a permanent record would be made. No matter whether or not a person sent in money, a permanent record would be made based on this form.

A. Yes.

Q. At this point in time right now would it be possible to determine from an examination of the files whether a person sent—of those persons that became members by filling out a form such as or similar to this one, would it be possible to determine which of those persons became members by sending in such a form?

A. It's my understanding that yes, you could.

Q. Would you know what proportion of persons becoming members of MCFL prior to 1978, prior to and including 1978, became members by mailing in a form such as Exhibit E?

A. No.

Q. What would be the difference between a form [38] such as this and a coupon which is mentioned

in the response to the Commission's interrogatories, Exhibit D?

*A. Coupons, they're referring to—I believe the coupons they are referring to were what were then called A&P coupons, and A&P was a chain grocery store that one day a week for a period of time had a method by which anyone buying anything in the store could sign a coupon designating a charity of their choice and A&P would send a certain percentage of whatever your grocery bill was to that charity of your choice along with the coupon as to who designated you as their favorite chart.

Q. If you filled out one of these coupons, then you would become a member of MCFL.

A. Yes.

MR. ANDERSEN: I ask the court reporter to mark this as Exhibit F. This was a copy, Mr. Fox, that you had, and your notations are on there, but let's mark it Exhibit F anyway.

(Commission Moran Exhibit F marked for identification)

Q. I ask you to take a look at that with specific reference to this page, sir, about one- [39] third of the way through. I don't know how to describe it any better than that. It's the front page—it's the third page of Volume 5, No. 4, and they are in order. I direct your attention to the upper right-hand corner of the page. Is this the A&P coupon to which you referred in your earlier testimony?

A. It appears to be.

MR. ANDERSEN: Can I ask the court reporter to repeat Mr. Moran's response as to what A&P did? I don't want to ask him a repetitive question.

*(Record read)

Q. When MCFL received such coupons, would the coupon remain part of the file for that member?

A. I don't know that.

Q. After a person sent in this coupon to MCFL, what would the person receive back from MCFL?

A. Well, they would receive a letter in January requesting that the person make a donation to MCFL.

Q. Were they notified at that point that they were a member of MCFL?

A. I don't know that—the letter is an annual letter sent from the then president to every [40] member.

Q. Did the person who had mailed in such an A&P coupon receive a specific letter directed to him or her saying that you are now a member of MCFL or words to that effect?

A. The salutation may have been "Dear Member of MCFL." I don't recall specifically.

MR. ANDERSEN: Off the record.

(Discussion off the record.)

MR. ANDERSEN: Back on the record.

Q. So then with respect to a person who had sent in an A&P coupon, between the time that the coupon was sent in to MCFL and the January letter, they would have received nothing from MCFL?

A. Unless there was a newsletter sent to every member.

Q. During 1978, how many such newsletters were sent to every member?

A. I don't know.

Q. Can I ask you who would be in a position to know that information?

A. Marianne Rea-Luthin would probably be the best person to know.

MR. FOX: Did we indicate that in answers [41] to interrogatories?

MR. ANDERSEN: I wanted to ask about that. It appears from the response to one of the interrogatories that one newsletter in each of the years that Election Editions went out went to the full membership. That is a little unclear to me.

Q. Let me ask you one final question with respect to coupons. Would a person be issued a membership card?

A. I don't think so.

MR. ANDERSEN: I have here what appears to be a petition with the "MASSACHUSETTS CITIZENS FOR LIFE, INCORPORATED" at the heading. In addition, there is another what appears to be a form for becoming a member of MCFL, and a January 1973 newsletter designated "Number 1." I ask you to mark that as Exhibit G.

(Commission Moran Exhibit G marked for identification)

Q. Would the witness please take a look at this Exhibit G.

A. Okay.

Q. I direct your attention to the first two pages of the petition. Would this be an example of [42] the petition referred to in Exhibit D?

A. Yes.

Q. Is this the only petition that MCFL circulated?

A. I really don't know.

Q. This petition was, though, used for establishing membership in MCFL?

A. Yes, it was.

MR. FOX: Would it appear that Pages 3 and 4 should be after 1 and 2 here?

MR. ANDERSEN: Excuse me? Off the record.

(Discussion off the record.)

MR. FOX: I would like the record to show that there may be some confusion in Exhibit G as to the numbering of pages or whether it's all supposed to be one document, but I understand counsel is going to inquire mostly on the first two pages.

MR. ANDERSEN: The record should reflect that it is not the Commission's position that this is all one document. We're not trying to say that.

Q. Again directing your attention to the petition, do you know when this petition, this particular petition, was circulated?

A. There were many of these petitions [43] circulated in early 1973 and following for some period of time.

Q. Were petitions such as this circulated every year between 1973 and 1978?

A. I don't know.

Q. Do you know how many signatures even approximately MCFL obtained on these petitions?

A. Not on these petitions, no.

Q. Does MCFL have a record of the signed petitions?

A. The actual signed petitions? I don't know whether they do or don't.

Q. The signed petitions were used to establish membership for those persons who signed the petition?

A. Yes.

Q. Do you know whether MCFL has kept a record of those members who became members of the organization through signing petitions such as this, Exhibit G?

A. It's my belief they have.

Q. Would you know what percentage of the 57,000-some-odd members that you mentioned in your affidavit, Exhibit A, would have become members through a petition such as this?

[44] A. No, I do not.

Q. What would have happened after a person signed a petition such as this? What—let me rephrase that. What would the next thing a person who had signed such a petition have received from MCFL?

A. Either the annual appeal letter or a newsletter if one went to the general membership before the annual appeal letter.

Q. The same as with the A&P coupon and the same as a form.

A. Yes.

Q. The fourth method by which MCFL ascertained agreement with its statement of purpose was said to be, in the response to Commission's interrogatories marked Exhibit D, oral communication with MCFL.

A. Yes.

Q. How would such a membership come about?

A. My understanding is that someone would see or hear of something about the organization and would call the office to get more information and would leave their name and address.

Q. Would they have to do more than call and leave their name and address?

[45] A. No.

Q. They would not specifically have to state that they agree with MCFL's statement of purpose during the oral communication?

A. I really—I never answer the phone at MCFL, so I really don't know what specifically they were

asked or—I really don't know what the procedure was.

Q. It is, however, your understanding that if a person called up and inquired about MCFL's activities and they gave their name and address, that they would be considered to be members.

A. That's my understanding.

Q. And as in the case of the other three methods, the communications from MCFL would have followed with the annual appeal letter or the newsletter if one was being circulated during that time period; is that correct?

A. Yes.

Q. Do you know whether the records of MCFL would reflect those persons who became members through orally communicating with MCFL?

A. I have no way of knowing that.

Q. Does MCFL or did MCFL keep a list of [46] telephone requests for information during that period of time 1973 to '78?

A. Segregated from other requests? I have no way of knowing.

Q. I'd like to direct your attention to Exhibit D. MR. ANDERSEN: Off the record.

(Discussion off the record)

Q. Exhibit D, Page 4, 6c at the bottom of that page. This is referring to the present method by which MCFL establishes membership under the 1980 articles of organization. It states, "Those persons who wish to assist the corporation in furtherance of its purposes as set forth in the articles of organization, and who affirmatively express in writing a specific and unambiguous desire to be a member of the corporation." This is apparently a description of how

a non-voting member becomes a member. Is that your understanding of the present policy?

MR. FOX: I, of course, object to 1980 procedures as being irrelevant.

A. The answer is yes.

MR. FOX: The same objection that I stated [47] before. Go ahead. Your answer is what?

THE WITNESS: Yes.

Q. This is a change from the policy since 1973 to 1978, '79. Was this change adopted by the board of directors prior to the filing of the new articles of organization?

A. I believe so.

Q. And under this present policy a writing is required; is that correct?

A. To be a non-voting member.

Q. Does MCFL at the present time have someone who examines such statements that come in to the organization to see if they conform with this policy?

A. It's my understanding they do.

Q. Would the memberships that came about during 1973 to '78 through the forms and the—excuse me. I don't mean the forms. I'd like to rephrase that question.

Would the memberships that came in from '73 to '78 through the coupons, the signing of petitions, and the oral communications be qualified for membership under this standard in Exhibit D?

MR. FOX: You're asking for a legal conclusion? [48] MR. ANDERSEN: I'm just asking for his view.

MR. FOX: I object to the question.

A. I would ask Mr. Fox. I would ask legal counsel for an opinion on that.

Q. As far as the organization is concerned, not legally, but as far as the organization is concerned,

let me just take those one at a time. Would the petition signature pass muster under this?

MR. FOX: I object.

A. Again my answer would be the same. At the present time I would refer any question of that kind to legal counsel retained by Mass. Citizens for Life.

Q. Okay. Thank you. Again directing your attention to Exhibit D, Page 4, looking at the totals of membership from 1978 through 1982 and looking at the non-contributing columns in '78 and '79 and then the non-voting columns for '80, '81 and '82, would each of those totals include persons who became members of MCFL using the coupon form that we've discussed?

MR. FOX: I'm going to object on all the previous grounds I've mentioned.

Q. Let's start with just 1978.

MR. ANDERSEN: You wouldn't have an [49] objection to that, I take it.

MR. FOX: 1978 I would not have an objection to his being asked what he knows. If he's asked to speculate, I guess I would.

Q. Do you know whether in 1978 some portion of those non-contributing members became members through the coupon form?

A. I really don't know in 1978.

MR. FOX: That coupon was earlier, wasn't it?

MR. ANDERSEN: What I'm referring to really is a cumulative total. Perhaps I should phrase my question that way.

Q. I don't take it to mean that in each of these years MCFL established the total membership independent of each previous year. These are cumulative totals, are they not?

A. My answer would be that if a person became a member of Mass. Citizens by sending in a coupon

and then—and I'm not sure what year that was—and subsequently made a donation to the annual appeal, then my answer would be they would—well, I guess then they become a contributing member. If I had to guess, I'd say yes, but I really cannot [50] absolutely say yes.

MR. FOX: Well, I don't even know what question you're answering at this point, but I move to strike the answer. Don't guess at anything.

Q. Let me rephrase it. If a person became a member prior to 1978 through sending in a coupon and that person did not respond to the annual appeal letter, would that person be retained as a non-contributing member of MCFL during that 12-month period?

A. During that 12-month period, yes.

Q. What about during the period after the 12-month period?

A. I don't know at what point in time they were no longer considered a member.

MR. FOX: No longer considered a what?

THE WITNESS: A member.

Q. Who would be in a position to have that information: How long a person is kept on a mailing list without any communication back and forth from the organization?

A. The executive director would have that information.

MR. ANDERSEN: Let's take a short break.

[51] (Short recess)

Q. I'd like to direct your attention to Exhibit D which is the response to Commission interrogatories associated with this litigation. Page No. 13—actually starting on Page 12 concerning Interrogatory No. 18, and it has to do with newsletters that may be distrib-

uted to persons who do not pay dues specifically. The statement that I'd like to ask you about is on Page 13, answer to Interrogatory No. 18, and the statement is, under "a," "In order to inform all members of MCFL of the position of candidates for a variety of public offices on pro-life issues, at various times an edition of the MCFL newsletter is distributed to members of MCFL." And under subpart "b" of Answer No. 12 it says, "1975—1; 1978—1; 1980—1," and those are references to the question of how often this occurred during those years.

Now, do you find that that statement—do you agree with that statement?

A. I'm confused. Is this saying that this is the only time in the history of the organization that all members have received a newsletter?

Q. That's my understanding of it on those [52] three occasions in those three years.

MR. FOX: Just those three years, I believe. Which question is the basic question?

MR. ANDERSEN: The basic question is Interrogatory No. 17 on the top of Page 12.

Q. Maybe you can just review those and then when you've had a chance to look at them, we can go on.

A. My recollection is that there would have been an issue in 1974 also that went to every member, but again that's just my recollection.

Q. Were those issues in each of those years listed under "b" on Page 13 and to the best of your recollection in 1974, were those Election Editions for each of those years?

A. Yes. I would also—my recollection is that in 1978 there were at least two.

Q. That was in the Special Election Edition and the one that said November 7th Election Edition?

A. It is my recollection there was one for the primary and one for the general election.

Q. Okay. And this indicates that these would have been distributed to the largest category of members, including those persons who are [53] non-contributing.

A. Yes.

Q. Has MCFL distributed other editions to the entire membership as we've defined it for those years?

A. I don't recall whether they did or they didn't.

Q. But with the exception of those editions you mentioned in the MCFL response to Interrogatory 18, you feel that those are correct; that there was one edition in each of those years, with the exception of 1973 which had two?

A. To the best of my knowledge.

Q. Do you know whether during the election year distributions 1976, 1978, 1980, and possibly 1974, specific numbers of the editions were set aside for this distribution or was the distribution conducted all in one mailing?

A. I really don't know how it was distributed.

Q. Do you know whether MCFL works with its local chapters in distributing these materials or whether it's all central? Is that information that you would have? Again, this is for the period up to '78.

[54] A. My recollection was that it would be mailed, a copy would be mailed to the general membership, and then additional issues or copies of a newsletter would be given to chapter chairmen at chapter chairmen's meetings who in turn would distribute those to members of their chapters whose names would not necessarily be on the Mass. Citizens' membership list.

Q. So a person could be a member of a local chapter of MCFL but not necessarily a member of MCFL, Inc.?

A. Not a recorded member.

Q. Not a recorded member.

A. Yes.

Q. How many chapters are there? Local chapters.

A. Now?

Q. Well, let's say 1978.

A. Somewhere in the 80's. 80-odd chapters.

Q. And do chapters have a typical size or do they vary enormously?

A. They vary greatly.

Q. Are there some chapters that only have ten persons?

[55] MR. FOX: In 1978 we're talking about?

MR. ANDERSEN: Yes.

A. I would say there probably were some chapters that only had ten members, yes.

Q. Would in 1978 the number of members in a local chapter, could it have equaled 50?

A. Yes.

Q. Could it have equaled 100?

A. Yes.

Q. Could it have equaled 500?

A. It's possible.

Q. Does MCFL have a record of the membership, the number of members in its local chapters?

A. No. Not that I'm aware of.

Q. Does MCFL consider the local chapters to be affiliates of—

MR. FOX: Objection. Too vague.

Q. Let me try another avenue. What is the relationship between MCFL, Inc. and the local chapters?

MR. FOX: Objection. Too vague.

Q. Does MCFL, Inc. interact with the local chapters?

MR. FOX: Object to the form. Do you [56] understand that lousy question? If you do, try and answer it.

MR. NOBLE: Or any of the three previous questions to which there was an objection.

A. There was in 1978, and prior to that, there were regularly scheduled chapter chairmen's meetings, and there were—it was the duty, one of the duties of the executive director to interact with the chapters on a regular basis.

Q. And what would the interaction have amounted to? What was done?

A. He would be in communication with the chapter chairmen or designated people within the chapter.

Q. Would you be able to estimate the number of persons involved in the local chapters?

A. No.

Q. Would there be any record of the numbers, if not the actual existence of the persons, but would there be any way to identify the number of persons involved in MCFL local chapters?

A. At the chapter level perhaps, but not at the corporate level.

Q. Do you know whether in printing its [57] newsletter MCFL set aside a certain number of the newsletters to be distributed to the chapter chairmen, chapter presidents?

MR. FOX: Are you talking about 1978?

MR. ANDERSEN: Yes, we are talking about between 1973 and 1978.

A. Whatever the membership was, it was mailed to—the balance of those printed would be distributed through the chapter chairmen or through the chapters.

Q. In looking at the 56,000-some members that MCFL claims for 1978, does that include persons who might be members of a local chapter?

A. It could include some members who are members of the local chapters, yes.

Q. But not necessarily.

A. That's correct.

Q. So, in an MCFL printing of a newsletter would be some number printed that would be in addition to the membership in the MCFL corporate files that would be then distributed to the chapter presidents who then in turn would distribute them to the local chapter members?

A. Yes.

[58] MR. FOX: Object to the form.

MR. ANDERSEN: I'd like to ask the court reporter to mark as Exhibit H this document.

(Commission Moran Exhibit H marked for identification)

Q. I ask the witness to take a look at it. It is from the production of documents made to the Commission by MCFL, what purports to be all of Volume 5, Nos. 1 through 6, I believe, of the MCFL Newsletters, and in addition the November 7th Election 1978 and the Special Election Edition from September of 1978. I want to ask you if you are familiar with the volume and series numbering system that MCFL uses for its newsletters.

A. I'm familiar with it, yes.

Q. When does a given volume for a series of newsletters begin? When does a given volume begin? In what month of the year?

A. January, I believe.

Q. And it runs how long?

A. For a calendar year.

Q. I direct your attention to the first volume 5, No. 4, which is about midway through. It looks like so (indicating). It's dated July-August 1977. [59] Then the next newsletter is Volume 5, No. 5, but it's dated February 1978. Why would it not start a new volume?

A. I don't know.

Q. And then if we look at the next number in the series, it is Volume 5, No. 6 dated May 1978. Are these numbers 5 and 6 part of the same Volume 5 in 1977?

A. From what I observe here, yes.

Q. I'd like to direct your attention now to the Special Election Edition, and it states in the upper left-hand corner "Volume 5, No. 3, 1978." Is this part of Volume 5?

A. You've got me. It says it's Volume 5, but I don't know who put that in. It's not printed. It's hand done. I don't know.

Q. Thank you. Are the newsletters printed on 8½ by 11 or legal size sheets?

A. The newsletters varied in size to my recollection.

Q. Some of them may have been oversized and they may have been on paper that was larger than what we have in our copies; is that correct?

A. That's my recollection.

[60] MR. ANDERSEN: This document purports to be Special Election Edition dated September 1974. I'd ask the court reporter to mark it as Commission Exhibit I.

(Commission Moran Exhibit I marked for identification)

Q. I hand it to the witness. Do you recognize this Special Election Edition as one of the documents that

was distributed to all members, including the non-contributing members, in 1974?

A. That's my recollection.

MR. ANDERSEN: I have here a Primary Election Edition dated August 1976. I'd like to ask the court reporter to mark this as Commission Exhibit J.

(Commission Moran Exhibit J marked for identification)

Q. I ask the witness to look at that, please. Do you recognize that Primary Election Edition as being one that was distributed to the non-contributing members?

A. Yes.

MR. ANDERSEN: I have here a document that's entitled "PRIMARY ELECTION 1980" and I'd like [61] to hand this to the court reporter for marking as Exhibit K.

(Commission Moran Exhibit K marked for identification)

Q. Have you had a chance to take a look at it?

A. Yes.

Q. Was Exhibit K distributed to non-contributing members?

MR. FOX: Objection, obviously on the previous grounds because this is a 1980 document. Also the terminology might be different.

Q. Had the terminology changed at this point where the new articles of organization were in effect at this time?

A. Yes.

Q. So this then would have been distributed to non-voting members as well as the other groups or other categories of members; is that correct?

A. Yes.

MR. FOX: No. Are you speculating or are you telling him you know? Just for my curiosity.

THE WITNESS: My belief is it was distributed to voting members and non-voting members as well as dues-paying members. I have no idea [62] whether it was distributed to the fourth category which I had never heard of until this morning.

MR. FOX: What's that?

THE WITNESS: There's a fourth category in the interrogatories. Non-contributing?

Q. I think that we already have marked as an exhibit a copy of the fourth Special Election Edition that I would like to ask you about. Let me just make sure. Yes. It's in Volume 5. It's Exhibit F. I direct your attention to Exhibit F and ask you to find the November 7th Election Edition. That may have been marked twice. Do you recognize this document as one that was distributed to non-contributing as well as contributing members of MCFL in 1978?

A. That's my recollection.

Q. Directing your attention to Exhibit A, which is your affidavit, Paragraph No. 14, which is on Page 5 of Exhibit A, states in essence that in addition to carrying on several functions mentioned, MCFL promoted the flow of information on pro-life issues by distributing pro-life literature. In 1978 it distributed many pieces of literature on pro-life issues in addition to, as it seems the sense of it [63] is, the newsletters; is that correct?

A. Yes.

Q. What kind of literature in addition to the newsletters did MCFL distribute? Have we seen some in looking through the documents?

A. Exhibit E would be an example. In addition, there would be numerous books, duplication of pro-

life newspaper articles, a number of pro-life books, articles, publications. Just a lot of information.

Q. Would these have been distributed to the general public?

A. To the members and to the general public.

Q. Directing your attention to Exhibit A, No. 17, Paragraph No. 17, the last half of that paragraph is the statement that, "Central to its political activities was the effort to educate its members through newsletters reporting on a candidate's voting record or his responses to questions on pro-life issues." In addition, referring to Exhibit F that we were just looking at, and drawing your specific attention to the Special Election Edition, there is a disclaimer that any particular candidate is endorsed by MCFL; is that [64] correct?

A. That is correct. On Page 8 there was a disclaimer.

Q. Do you think that the Special Election Edition fairly presents the position of a candidate discussed in the edition with respect to abortion issues?

A. To the best of my knowledge it does.

*Q. Would you say that the Special Election Edition informs the reader whether the identified candidate has a pro-life stance on abortion issues?

THE WITNESS: Could you reread that question?

*(Record read)

A. I believe it informs the reader of the stance of all of the individuals whether they be pro-life or pro-abortion.

Q. It informs the reader of their positions on abortion.

A. Yes.

Q. If a candidate is identified as being pro-life, what does that mean to you?

A. To me personally?

Q. Yes.

[65] A. It means that in this particular instance that they answered the questions that were submitted to them if they were not an elected official with a yes vote or a yes answer whether or not they would support certain positions requested or asked of them, and if they were an elected official, it would indicate their position on certain votes that had been recorded whether in the House of Representatives or the Senate.

*Q. When MCFL prints on this election edition "Vote Pro-Life," does MCFL encourage the reader to vote for those candidates who are identified on those issues discussed in the edition as being pro-life in their stance?

MR. FOX: I'll object. Calls for a legal conclusion. The document speaks for itself. His opinion is irrelevant. Anyone's comment is irrelevant. I construe the question as asking for his personal opinion. If you mean for it to be so, go ahead and answer if you have a personal opinion.

Q. I would ask you your personal opinion.

MR. FOX: I still object on all the mentioned grounds. You can answer. What's the question?

[66] *(Record read)

A. My belief is that this particular edition educates or informs the membership as to how certain candidates voted as elected officials prior to this on abortion-related issues and/or answered questions submitted to them for the purpose that it would be my personal hope that being so informed and so educated, that the person would vote pro-life.

Q. Would your opinion be the same as a director of MCFL?

MR. FOX: Object to the form.

A. I was a director of MCFL and still am.

Q. Is your opinion speaking as a director of MCFL the same as you just announced?

MR. FOX: I don't understand the question, but he may answer if he understands it.

Q. Do you understand the question?

A. Clarify it, please.

Q. I asked you a question, and after discussion with counsel, asked you for your personal view, and I believe that's what you gave. And now I am asking you for your view as a director of MCFL if it is the same as your personal view or if it is different.

[67] MR. FOX: I'm objecting on all the other grounds. In addition, I don't understand what the difference is. I'm telling the witness he can answer if he understands.

A. I don't understand where I would be different as an individual or as a director, so my answer would stand.

MR. FOX: I guess he doesn't have two opinions once he puts on a director's hat.

MR. NOBLE: That is the question. Some people do take one position in an official role and another position in a personal role.

Q. I'd like to go back to a question about the board of directors, and we're speaking of between 1973 and 1978. During that period of time, did the board of directors have meetings?

A. Yes.

Q. How often were those meetings?

A. Initially they were monthly. At some point in time I believe we went to a quarterly and then we reverted back to monthly again.

Q. Are minutes of those meetings kept?

A. Yes.

Q. One other area I wanted to ask you about [68] was I asked you a few questions about the local chapter and the distribution of the newsletters to the local chapters. I'm just not clear on it, and if we say in 1978 that according to the affidavits and so on that 56,000 issues of a special edition went out to the membership, does that include—does that number of 56,000 include copies that were made available to chapter presidents?

A. No.

Q. So those would be additional—there would be an additional number of copies printed above 56,000 to take care of those distributed to members of the local chapter.

A. Yes.

Q. Do you know what that additional number would have been for the Special Election Edition?

A. From what I have read, it's a hundred thousand.

Q. Pardon?

A. The total number of Special Election Edition's was 100,000 printed.

MR. ANDERSEN: That's all. No further questions.

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

DEPOSITION of MARIANNE REA-LUTHIN, a witness called on behalf of the Plaintiff, taken pursuant to the Federal Rules of Civil Procedure, before Ralph J. Simpson, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the U.S. Customs House Courtroom, 13th Floor, No. 2 India Street, Boston, Massachusetts, on Thursday, August, 1982, commencing at 9:10 a.m.

PRESENT:

R. Lee Andersen, Esq. and Lawrence M. Noble, Esq., Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20460, for the Plaintiff.

Bingham, Dana & Gould (by Francis H. Fox, Esq.), 100 Federal Street, Boston, Massachusetts 02110, for the Defendant.

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[8] of 1978.

Q. Are any of those positions paid positions?

A. The legislative aide and the executive director position were paid positions. Before and since that

time I have served solely on a voluntary basis with no payment.

Q. The president's job is a voluntary position?

A. Yes.

Q. Are you familiar with an organization called the Massachusetts Citizens for Life Political Action Committee?

A. Yes.

Q. I'll refer to that as MCFL PAC. Do you have a position with the MCFL PAC?

A. Yes, de facto. I believe the correct title is chairman. The president is automatically the chairman of that.

Q. When did you first become involved with MCFL PAC?

A. I don't recall the exact date that PAC was established. I believe it was sometime in 1980.

Q. Have you been involved in the PAC since its formation?

A. Yes.

[9] Q. Did you help to form the PAC?

A. I don't know exactly what you mean by that.

Q. Did you assist in organizational efforts?

A. I was—I'm trying to recall. I can't remember the exact date, so if I was president, I would have automatically been on. If I had not been at that time, I must have been appointed. I just can't recall the exact dates.

Q. Would it be fair to say it was shortly after the organization was formed at the very least?

A. Yes.

Q. Thank you.

MR. ANDERSEN: I have a document here that's described as the "AFFIDAVIT OF MARIANNE REA-LUTHIN." It has attached to it a Special Elec-

tion Edition of a newsletter. It has, I think, two newsletters attached to it. It has a candidate questionnaire, several candidate questionnaires attached to it. I'd like the court reporter to mark this as Commission Exhibit A.

(Commission Rea-Luthin Exhibit A marked for identification)

Q. I'm handing this to the witness. Would you please review this. I guess this is two copies here.

[10] MR. FOX: I think that is a special corrective four-page edition that came out after the earlier one.

Q. If you'll look on what appears to be the second copy of the edition, it says in a small box toward the lower left "Complimentary Partial Copy." I think that distinguishes it from the other.

Can I direct your attention to Page 8 of the affidavit itself. Is that your signature?

A. Yes, it is.

Q. Do you recognize this affidavit and its attachments?

A. Yes.

Q. Did you prepare this affidavit?

MR. FOX: I think I must have prepared it.

A. Someone in the law office wrote the original draft and then I reviewed it and made what I felt were corrections or additions.

Q. Thank you. I would like to direct your attention to Page 1, the paragraph numbered 2. There is a statement there that you had final responsibility for the content and layout of the editions that are attached.

A. Yes. I was the editor for the Special [11] Election Edition. I am a little unclear what that second attachment is.

Q. For purposes of our discussion right now, let's just consider the first.

A. The Special Election Edition dated Volume 5 No. 3?

Q. Yes.

A. Yes, I was the editor for that particular edition.

Q. Did you also have responsibility for the circulation of the edition?

A. To some extent.

Q. Did you share this responsibility with someone else?

A. Could you be a little bit more specific?

Q. Would you have been responsible for the size of the circulation, the number of copies?

A. Essentially. I did call the printers to get estimates of the prices and did make the final decision after consulting the president of the organization.

Q. And how would you determine—how did you determine for the Election Edition the size of the circulation, the size of the printing?

[12] A. I did a rough count of the number of members' names who were contained in our files and I then—we also would normally distribute copies of the newsletter to our chapter chairmen who would have members in their files that we would not necessarily have in the state office, so I just took a reasonable guess; also based on the amount of money the organization had at the time.

Q. The printing of the Election Edition that you have in front of you was larger than the typical newsletter printing; is that not correct?

A. Yes.

Q. During the period of 1978, what was the approximately the typical circulation of the newsletter?

A. I couldn't give you an exact figure. This is the only newsletter for which I was the editor. There had been a change in staff, so I was not directly responsible for that. I believe it's contained in one of the affidavits.

Q. You were the editor then for the Election Edition, Special Election Edition only?

A. Yes. As I said, there had been a change in staff and I was the only one employed full time.

[13] Q. Did you then continue to edit subsequent—

A. No.

Q. Did you continue to edit the MCFL Newsletter?

A. No. I left the organization on a paid basis, as I mentioned, somewhere either the end of September or beginning of October of '78.

Q. When you acted as editor of the Election Edition, were you a paid staff member?

A. Yes.

Q. Is this the only Election Edition that you ever edited?

A. In 1976 I did work on the questionnaires. I did not edit the paper.

Q. You mentioned questionnaires. Could you be more specific in describing those questionnaires? What kinds of questionnaires were they?

A. The same as what's attached to this exhibit.

Q. In going through the files that you mentioned to determine who would receive copies of the Election Edition, the 1978 Election Edition, was the file divided into different groups of persons, different categories of persons that received communications from MCFL?

[14] A. The file was divided into zip code order because that's the way the mailing had to be done.

Q. Approximately 57,000 of the Special Election Editions were distributed; is that correct?

A. Yes.

Q. Why was this distribution so much larger than, say, the newsletter that was distributed just previous to the Election Edition?

A. Financial considerations.

Q. Were financial considerations the only consideration?

A. Basically we would like to have every newsletter go out to every member at every time. It's just not financially possible.

Q. Did you ever send newsletters—I'm not talking about the Special Election Edition, but newsletters to, say, half of the number of persons who received the Election Edition?

MR. FOX: I think the question is ambiguous about "you." I think she testified she only was editor of one edition. She may have knowledge or observations as to what was done by others, but if I'm right, she said she only edited this one edition.

Q. Are you familiar with the printing and [15] circulation—let me ask you if you are familiar with the size of the printing of other MCFL newsletters.

A. Not specifically.

Q. Do you know whether the distribution of the Special Election Edition was larger than the typical MCFL distribution of newsletters?

A. I believe it is, because I know that we would not have the money to mail out to the entire membership on every newsletter.

Q. Are you familiar with the membership categorizations that MCFL used in 1978?

A. Yes.

Q. Would you please state for the record what those categories were?

A. Well, there were actually three, two of which are refinements of a paid membership category. We had two kinds of membership where people would actually donate money. Dues-paying members would contribute \$15 or more. Contributing members would contribute less than \$15, and then we had a general membership composed of anyone who had affirmed in some way the statement of purpose of MCFL.

Q. Were the three categories of members [16] tallied on separate mailing lists?

A. At that time in 1978 there was a separate file kept just of contributors, and then all of those names were integrated with the general membership file so that there was one file in the office that had everyone's name, and there was a separate file with contributors' names and the amounts they had given.

Q. You did not make a distinction then between the dues-paying and contributing members for purposes of your mailing list; is that correct?

A. Every person who contributed, that person's name would be on a card with the amount they had given, so it could change during the year. If someone had contributed \$10 and then sent in \$5, that would be noted on the card.

Q. At the time of the 1978 Election Edition, did you use a computer-controlled mailing list?

A. No.

Q. How did you handle the labeling and organization of the newsletters?

MR. FOX: Again, I'll object. I think she should be asked only about this one where she was the editor. [17] Q. Let me rephrase it and ask you how the physical organization and distribution of the Election Edition occurred.

A. Each member's name and address was typed on what is called an Elliott card, and those cards

were filed in zip code order. The cards would be taken to the mailing house, and I'm not exactly sure what the process is called, but somehow the cards would be run through the machine and a picture of the name and address taken and placed on a label or directly on the piece. I don't recall exactly what the mechanical procedure was.

Q. Do you have—

A. There was physically a card there with a name and address for each member.

Q. Do you have knowledge as to how the regular newsletter was distributed?

A. That changed over the years. Originally they were hand addressed. At that particular point I don't know whether that had been mechanized or not.

Q. The Special Election Edition was not hand addressed; is that correct?

A. Not in 1978.

Q. Do you know how the MCFL newsletters are [18] referred to? Do you know how they're systemized?

MR. FOX: Object to the question. I don't understand it.

Q. Do you know how the volume and specific issues are labeled? Let me rephrase it. If you will look at the attachment in the Election Edition, at the top left it says "Volume 5, No. 3, 1978." To what does that volume and number refer?

A. I assume—and I really can't speak with authority because I didn't work on the other newsletters—I assume it was the third edition of the newsletter for that year.

Q. Let's just refer then to this one that we have in front of us and not refer to the other one right now. Did you write "Volume 5, No. 3, 1978" on this Election Edition?

A. That is not my handwriting.

Q. Do you know how the designation "Volume 5, No. 3" appeared on the Election Edition?

A. No.

Q. Do you recall whether "Volume 5, No. 3" was on the Special Election Edition at the time you took the original copies to the printer?

A. I really wouldn't recall.

[19] Q. Do you know if each of these "Volume 5, No. 3" designations were written on the Special Election Edition by hand after the printing?

A. I don't know where that came from.

Q. Do you have knowledge of the volume and series number with respect to other Special Election Editions that MCFL may have prepared and distributed in the past?

MR. FOX: Object to the form.

Q. Let me try to rephrase it. Do you have knowledge of the volume and series designation with respect to MCFL newsletters?

A. To tell you the truth, I never gave it any thought.

MR. ANDERSEN: I have here what purports to be Volume 5, Nos. 1 through 6 of the MCFL Newsletters, and in addition the November 7th Election 1978 Edition dated October 11, 1978, and the Special Election Edition designated Volume 5, No. 3, 1978. Handing this to the court reporter, I'd like to have this marked as Commission Exhibit B.

(Commission Rea-Luthin Exhibit B marked for identification)

Q. I'm handing this to the witness. I'd like [20] you to take a look at those and see if you have seen them before or are familiar with them. Do you recognize these?

A. Yes.

Q. You'll notice that Volume 5 consists of Nos. 1 through 6. If you look through them all, that's the way they are numbered. Does looking at the volume and numbers of the newsletters in Exhibit B refresh your recollection as to how the newsletters are numbered?

A. I can read the way they're numbered.

Q. Does it refresh your recollection as to the system used by MCFL to number its newsletters?

A. I was never involved in numbering newsletters.

Q. Okay. Thank you. Mrs. Luthin, you stated earlier that you were not involved with any of the other election editions; is that correct?

A. I don't believe I said that. I was not the editor of any other election newsletter. I did work on the process of integrating the questionnaires that had been returned on the 1976 newsletter, but I was not responsible for the format or the content of the final product.

[21] Q. Were you involved with the distribution of the other election editions?

A. I don't specifically recall.

Q. Do you have knowledge as to who of your members, of those persons that MCFL claims as members, would have received the earlier Election Editions?

A. I assume that every member received one.

Q. When you say "every member," do you mean to include the three categories you mentioned?

A. Yes.

Q. But it wasn't ordinary for MCFL to distribute newsletters to all members of all three categories, was it?

A. I was not involved with the newsletter. I don't know what occasions on which every member received a newsletter.

MR. ANDERSEN: I have here what purports to be a copy of a Special Election Edition dated September 1974. I'd like to have this marked as Exhibit C.

(Commission Rea-Luthin Exhibit C marked for identification)

Q. Handing this to the witness, Exhibit C, [22] take a quick look at that and tell me if you recognize it.

A. Yes.

Q. Were you involved in the process of preparing this Special Election Edition, Exhibit C?

A. No, sir.

Q. Thank you.

MR. ANDERSEN: I have here what purports to be a Primary Election Edition dated August 1976. I'm handing this to the court reporter to be marked as Exhibit D.

(Commission Rea-Luthin Exhibit D marked for identification)

Q. I'm handing Exhibit D to the witness. Would you please review that.

MR. ANDERSEN: Off the record.

(Discussion off the record)

MR. ANDERSEN: I went off the record to tell Mr. Fox some information concerning the number of copies of these exhibits that we have.

Q. Are you familiar with this document?

A. Yes.

Q. Exhibit D?

A. Yes, sir.

[23] Q. Were you involved in any aspect of the preparation of Exhibit D?

A. Yes. As I recall, I sent out the questionnaires to the state candidates listed.

Q. Do you know whether all three categories of members of MCFL received this edition, Exhibit D?

A. I would assume so. I wasn't directly involved in it, but I would assume so.

Q. Do you recall how many copies were printed?

A. No.

Q. Do you have any knowledge whatsoever as to even the approximate number?

A. No.

MR. ANDERSEN: I'd like to refer you now to Exhibit B and approximately three quarters of the way through the exhibit is a copy of the November 7th Election 1978 Election dated October 11, 1978. Were you involved in the preparation of this November 7th Edition?

A. Not directly. I had left the organization by that time. I did not put this together, although the results from the questionnaires appear to be a condensation of what had been done in the previous edition which I did edit.

[24] Q. Do you have any knowledge concerning the number of copies of this Election 1978 Edition?

A. No.

Q. I'd like to direct your attention again to Exhibit A and specifically to your affidavit, Paragraph No. 9 on Page 4. The section I wish to refer you to is the sentence that states, "The publication of the position of the candidates was intended as an educational service for concerned voters, not as an endorsement of particular candidates." Do you agree with that statement?

A. Yes.

Q. Now I'd like to refer you to the Special Election in Exhibit A. Does this Election Edition fairly represent the positions of the candidates referred to on the abortion issues that the edition discusses?

A. I believe it does.

Q. Does this Election Edition identify the candidates discussed with respect to their position on abortion issues?

A. It states the position of the candidates, yes.

*Q. Does this Election Edition identify [25] candidates as being pro-life?

MR. FOX: Objection. The document speaks for itself. Also on relevance grounds. Her opinion of what it does is irrelevant.

MR. ANDERSEN: Well, I disagree. I think that the statement by her of her own personal opinion that the Election Edition was not an endorsement of candidates is at issue in this case, and that's the foundation that I'm trying to lay by asking these questions.

MR. FOX: I'll allow you to inquire. I'm objecting on the grounds of relevance and that it does speak for itself, but read the question back. Maybe she can answer it.

*(Record read)

A. This Special Election Edition contains the position of the candidates on the pro-life issue.

Q. Does MCFL wish to encourage voters to vote for pro-life candidates?

MR. FOX: I'll object on relevance. The question is ambiguous as to time, and also I think she should be asked about what her observations are. I don't think she has been empowered to speak for MCFL on the matter of desire. If you're asking her [26] personal

opinion as to what MCFL would like or wouldn't like, go ahead and ask it.

*Q. Is it your opinion that the Election Edition marked as Exhibit A encourages the reader to vote for candidates whose position on pro-life is that of being against abortion?

MR. FOX: I certainly object on relevance and on the document speaking for itself, but she may answer.

A. Could you just repeat the question?

*(Record read)

A. I believe the newsletter gives information to people concerning the positions of candidates on the pro-life issue.

Q. What does "vote pro-life" mean to you, Mrs. Luthin?

A. In what context?

Q. What do the words "vote pro-life"—let me refer you to the bottom right-hand corner of the Election Edition that we're looking at. It says, "vote pro-life on September 19; and encourage your friends and neighbors to do the same." That is the context that I'm referring to.

A. Well, that particular statement is taken [27] within the context of a larger article within the newsletter which encourages people to read the information that's contained in the newsletter.

Q. Which article is that that you're referring to?

A. The text you're quoting from reads, "If you care about the unborn, please read the enclosed information, fill in your choices on the blank ballot on the back page," and then it says to "vote pro-life on September 19."

*Q. At the risk of repeating myself, can I ask you again, please, to answer the question. What do the words "vote pro-life" mean to you?

MR. FOX: Of course I object on relevance, best evidence. It speaks for itself.

MR. ANDERSEN: Mr. Fox, are you now acting as Mrs. Luthin's lawyer at this point? Are you now representing Mrs. Luthin?

MR. FOX. Does she need representation? You tell me. If she does, I'll do it.

MR. ANDERSEN: I'm simply asking you since you're making objection.

MR. FOX: I'm here representing the defendant in the lawsuit you brought. I thought [28] that would be apparent.

MR. ANDERSEN: Yes.

MR. FOX: If there is any ambiguity, I will try to relieve the ambiguity in your mind.

MR. ANDERSEN: Could you repeat the last question?

*(Record read)

A. Could I just ask if you mean in the content of this newsletter?

Q. No. I'm asking you what the words mean to you. We discussed it in the context of this newsletter and you made your response. I'm simply asking now—

A. In general?

Q. In general. Personal view.

A. My personal understanding of what it would mean to vote pro-life would be to study the positions of various candidates at different levels of government on their position on the life issues and to take

those positions into account when deciding which candidates to vote for.

Q. You're saying then that the statement does not encourage a person to vote pro-life, but rather just to consider the issues. Is that your—

[29] MR. FOX: Object to the form.

Q. Are you saying that the statement "vote pro-life" does not encourage a person to make a vote for those candidates—

A. I don't think I said that. What I said was that people need some basis on which to make their decisions, and obviously a person couldn't vote pro-life unless they knew what the position of a candidate was on that issue.

Q. Okay. Thank you.

MR. ANDERSEN: I'd like to take a short recess.

(Short recess)

MR. ANDERSEN: Back on the record.

Q. I'd like to return to the area of membership that you testified about earlier. I'd like to ask you the question, once a person has contributed to MCFL, how often do they have to keep contributing in order to maintain their status as a contributing member?

A. Membership is based on a yearly basis.

Q. So once a person makes a contribution, they have twelve months within which to make another contribution in order to maintain membership; is [30] that correct?

A. Yes.

Q. How much money would a person have to contribute in order to maintain their membership? Let's take each category. Let's take first the dues-paying.

A. Are you talking about 1978?

Q. Yes. I'm sorry. Referring to 1978.

A. I believe that at that time the dues-paying member was \$15. That \$15 contribution entitled a member to also receive the National Right to Life News, so that was the cutoff point, \$15, and contributing members would be anyone who contributed less than \$15.

Q. What would be the minimum that MCFL would have accepted at that time?

A. We would accept any amount.

Q. A dollar?

A. Sure.

Q. The contributing member, his or her membership, even if they wanted to only contribute even \$1, would be a twelve-month membership; is that correct?

A. Yes.

[31] Q. The policy that you just outlined for 1978, was this an official policy of MCFL?

A. I had always understood it to be. I don't know whether there was an official vote taken by the board.

Q. Was this policy written down anywhere?

A. Yes. It would have been detailed in the annual appeal letter that did go out to members.

Q. Did the annual appeal letter go to all three categories of members?

A. Yes.

Q. And this is where the policy outline would have been written down.

A. Yes. I'm a little bit hazy on the dates. As I explained, at some point we sent the National Right to Life News out, and I don't know the exact years in which that was done, but I believe that was still in existence at that time.

Q. Did the National Right to Life Committee send you copies of their newsletter each month?

A. We received them on a bulk mail basis and we would send them.

Q. You would then distribute them to your contributing members.

[32] A. Yes.

Q. Dues-paying members?

A. I'm sorry. Dues-paying.

Q. Did you pay for the National Right to Life Newsletters?

A. Yes.

Q. And how much would you have paid in 1978?

A. I really don't recall. We did it on a bulk basis because it was cheaper than sending the subscriptions and saved bookkeeping. I really wasn't involved directly in that kind of office work for very long. I'm a little bit hazy, but that is my general recollection.

Q. Do you, Mrs. Luthin, know whether MCFL has given the Commission a copy of their annual appeal letter?

MR. FOX: What is the annual appeal letter?

MR. ANDERSEN: We were just discussing it. I'm not sure I know.

A. That is the letter which is sent out to all members usually in January. I believe I did see a copy of it in one of the attachments.

MR. ANDERSEN: Towards the back of the MCFL document production we have several letters. Maybe [33] it would be easier—could we ask MCFL to see if we have that appeal letter in our production, and if we don't, request that?

MR. FOX: That's an annual appeal reminder. There's something that would precede that. I'll check that.

MR. ANDERSEN: If you could check. If we do have a copy, fine. If not, perhaps you could make one available. I have no further questions.

MR. FOX: No questions.

(Whereupon, at 10:25 a.m., the deposition was concluded)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

**ANSWERS AND OBJECTIONS OF MASSACHUSETTS
CITIZENS FOR LIFE, INC. TO SECOND SET OF
INTERROGATORIES PROPOUNDED BY
FEDERAL ELECTION COMMISSION**

Massachusetts Citizens for Life, Inc. ("MCFL") answers the Second Set of Interrogatories propounded by the Federal Election Commission ("FEC") pursuant to Fed. R. Civ. P. 33 as follows:

INTERROGATORY NO. 1

For the period 1973 through 1978, MCFL has claimed three classifications of members, dues paying, contributing and non-contributing. For the year 1978, MCFL has stated that the number of its members was approximately 55,822 members.

- a. During the period 1973 through 1978, did MCFL drop from its membership rolls any persons whom it no longer considered to be members?

- b. If the answer to part a. is yes, please answer the following questions:
- 1) How many persons were dropped from MCFL's membership rolls for each year from 1973 through 1978?
 - 2) What criteria were used by MCFL to select persons to be dropped from MCFL's membership rolls for each year from 1973 to 1978? Were these criteria memorialized in written form?
- c. If a person was accepted by MCFL as a non-contributing member, how long was this person retained as a non-contributing member if he or she failed to respond to a subsequent annual appeal letter?
- d. If a person was accepted by MCFL as a non-contributing member, how long was this person retained as a non-contributing member if he or she did not thereafter communicate in any way with MCFL?
- e. Did persons classified as dues paying members automatically become a non-contributing members [sic] after the expiration of twelve months without their making any payment of money to MCFL?
- 1) If the answer to part e. is no, did persons classified as dues paying members automatically become contributing members after the expiration of twelve months without their making any payment of money to MCFL?
 - 2) If the answer to part 1) is no, were such persons retained as dues paying members?

- 3) If the answer to part 2) is yes, how long were such persons retained as dues paying members without receipt of any payment by MCFL?
- f. Did persons classified as contributing members automatically become non-contributing members after the expiration of twelve months without their making any payment of money to MCFL?
 - 1) If the answer to part f. is yes, were members given notice of this change in membership classification?
 - 2) If the answer to part f. is no, how long after the expiration of twelve months without making any payment of money to MCFL would such persons continue to be considered contributing members?
- g. For each year from 1973 through 1978, how many new members were entered into MCFL's membership rolls for each of the three classifications of membership claimed by MCFL during this period of time?

OBJECTION TO INTERROGATORY NO. 1

MCFL objects to Interrogatory No. 1 on the ground that it seeks information which is not relevant to the subject matter involved in this action.

ANSWER TO INTERROGATORY NO. 1

Without waiving its objection, MCFL answers this interrogatory as follows:

- a. During the period 1973 through 1978, MCFL had no fixed procedures or policies for deter-

mining the length of time a person would be retained as a member. MCFL has no records which indicate whether and when persons were dropped from its membership list during that period. However, based on reasonable efforts to ascertain the procedures followed by MCFL prior to 1978, it would appear that most persons who became members subsequent to 1973 were retained on the membership list through 1978 unless they had (i) moved and left no forwarding address, (ii) requested that their name be removed from the membership list, or (iii) died.

- b. 1) MCFL does not have records which would indicate the number of persons dropped from its membership list between 1973 and 1978.
- 2) See a., *supra*; MCFL had no written criteria for removing names from its membership list.
- c. See a., *supra*.
- d. See a., *supra*.
- e. No.
 - 1) Yes.
 - 2) N/A.
 - 3) N/A.
- f. No.
 - 1) N/A.
 - 2) During the period in which MCFL had "contributing" and "non-contributing" mem-

bers, MCFL had no fixed procedures or policies regarding the length of time that a contributing member would be considered as such if he or she did not make a payment of money to MCFL within twelve months of his or her last contribution. However, based on reasonable efforts to ascertain the procedures followed by MCFL prior to 1978, it would appear that on an irregular basis such persons would be removed from the list of contributing members.

- g. MCFL has no records which indicate the number of new members who were entered into MCFL's membership list for each of the three classifications of membership which MCFL had between 1973 and 1978.

INTERROGATORY NO. 2

During years 1973 through 1978 did MCFL make any filing with the Internal Revenue Service under 26 I.R.C. § 501(c)(4) (1982)?

- a. If the answer to Interrogatory No. 2 is yes, please respond to the following:
- 1) In which years did MCFL file under Section 501(c)(4)?
 - 2) What was the name of the person who prepared the filing for MCFL?
 - 3) If in any particular year from 1973 through 1978 a filing under Section 501(c)(4) was not made, please state why such a filing was not made for that year or years.

OBJECTION TO INTERROGATORY NO. 2

MCFL objects to Interrogatory No. 2 on the ground that it seeks information which is not relevant to the subject matter involved in this action.

ANSWER TO INTERROGATORY NO. 2

Without waiving its objection, MCFL answers this interrogatory as follows:

No.

a. N/A

INTERROGATORY NO. 3

In MCFL's May 6, 1982 Answers and Objections to the Federal Election Commission's First Set of Interrogatories (Answer to Interrogatory No. 18b.), MCFL stated that on one occasion during each of the years 1976 and 1978 MCFL distributed what is claimed to be an edition of the MCFL newsletter to all those persons considered by MCFL to be members. Please identify these materials by the title, date, volume and number that appeared upon them.

ANSWER TO INTERROGATORY NO. 3

1976—Title: Massachusetts Citizens For Life
Newsletter—Primary Election Edition

Date: August, 1976

Volume and Number: Volume 4, Number 6

1978—Title: Massachusetts Citizens For Life Special Election Edition

Date: September, 1978

Volume and Number: Volume 5, Number 3

I, Henry C. Luthin, hereby certify that I have read the foregoing Answers and Objections of Massachusetts Citizens for Life, Inc. to Second Set of Interrogatories Propounded by Federal Election Commission and to the best of my knowledge, information and belief, I believe them to be true.

Signed under the pains and penalties of perjury.

/s/ Henry C. Luthin
HENRY C. LUTHIN

DATED: September 17, 1982

Pursuant to Fed. R. Civ. P. 33(a), I, Jeffrey R. Martin, hereby certify that I am the attorney who made the foregoing objections.

/s/ Jeffrey R. Martin
JEFFREY R. MARTIN
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

[Certificate of Service Omitted in Printing]

MASSACHUSETTS CITIZENS FOR LIFE, INC.
MUR 957

Answers to Interrogatories

1. Is the Massachusetts Citizens for Life incorporated?
A. Yes.
Is MCFL incorporated for purposes of liability only?
A. Liability was a major reason for incorporation. There were others, however, such as permanency and tax considerations.
2. Please submit MCFL's articles of incorporation, constitution and by-laws.
A. Articles of Incorporation and By-laws are attached. MCFL has no "constitution".
3. Is MCFL a membership organization?
A. Yes.
4. Does MCFL conduct political activities in connection with federal elections?
A. No. MCFL is a non-partisan organization which disseminates the voting records of incumbents and views of non-incumbent candidates on issues of concern to the pro-life movement. MCFL urges its members to vote.
5. Does MCFL support candidates for federal office?
A. No. MCFL endorses no candidates for federal office. It does urge members to vote pro-life.

6. Does MCFL print and distribute a tabloid or other communication which discusses or endorses candidates for federal office?

A. MCFL endorses no candidates for federal office. MCFL does print a newspaper in tabloid form which, on occasion, among other matters discusses candidates for federal office.

7. Please submit a copy of each tabloid distributed by MCFL during 1978.

A. Copies of each newspaper or newsletter distributed by MCFL from its statewide office in 1978 are attached with the exception of the "Complimentary Partial Copy" of the Special Election Edition, as to which no copy can be located. The FEC already has a copy of that edition.

8. Does MCFL pay all expenses for the preparation, printing and distribution of these tabloids? What was the total cost to MCFL in connection with these tabloids during 1978? Please submit documentation in this regard (paid bills, cancelled checks, etc.).

A. Yes. The total cost to MCFL in connection with the newsletters distributed in 1978 was approximately \$12,625.16, broken down as follows:

February, 1978

Prepared by staff	\$ 150.00 (approx.)
Printing:	
Newton Corner Press	730.80
Mailing and Postage	148.21
	<hr/>
	\$1,029.01

May, 1978

Prepared by volunteer	\$ 0
Printing:	
Newton Corner Press	341.25
Mailing and Postage	177.16
Watson Mailing Service	45.00
	<hr/>
	\$ 563.41

Special Election Edition

Preparation by staff	\$ 475.00 (approx.)
Printing:	
National Press Corp.	2,113.75
Mailing:	
Watson Mailing Service	1,967.90
Postage	4,874.11
	<hr/>
	\$9,420.76

*Special Election Edition,
Complimentary Partial Copy*

Preparation	\$ 0
Printing	392.00
Mailing	0
	<hr/>
	\$ 392.00

October, 1978

Preparation done by volunteer	\$ 0
Composition and Makeup:	
Lann Printing Co.	150.00
Printing:	
National Press Corp.	1,106.00
Mailing:	
Watson Mailing Service	83.98
Postage	262.00
	<hr/>
	\$1,601.98

Copies of available documentation are attached.

9. How many people were on the mailing list for MCFL's tabloid distributed in 1978? How was the mailing list compiled?

A. February, 1978	— 1,976
May, 1978	— 2,109
Special Election Edition	— 58,025

Special Election Edition,
Complimentary Partial Copy — 0
October, 1978 — 3,119

The mailing list for the February, May and October 1978 editions of the newspaper was compiled from a list of MCFL's contributing members. The mailing list for the Special Election Edition was compiled from MCFL's list of members consisting of those persons who have indicated agreement with MCFL's statement of purpose, by a variety of ways. The Complimentary Partial Copy was not mailed, due to the fact that there was not sufficient time to guarantee receipt prior to September 19, 1978. That edition was printed for the sole purpose of correcting errors in the full edition's reporting of the voting records of Congressmen Tsongas, Studds, and Drinan. It was forwarded to certain local chapters for hand-delivery.

10. How does MCFL raise funds to conduct its political activities? Does MCFL accept corporate contributions in this regard?

A. MCFL raises no funds earmarked for political activities. Funds are raised by a variety of means which include membership dues, annual fund appeal to all those persons who have indicated, by a variety of ways, agreement with MCFL's statement of purpose, annual state dinner, auction and furniture sales, annual raffle, fund raising dinners, wine-tasting and cocktail parties, walk for life, yard sales, dances, MCFL Night at Pops, various other Chapter functions, and sale of red roses. MCFL does not

accept corporate contributions from business corporation. It has, on occasion, accepted contributions from the Knights of Columbus, which may be an incorporated non-profit membership corporation.

11. Does MCFL maintain a separate bank account for its monies spent in connection with federal elections?

A. No. MCFL further states that no monies are spent "in connection with federal elections", as the term is used in 2 USC § 441 6.

12. What is the purpose of the "Y", "N" designations for candidates in the attached MCFL tabloid?

A. Each non-incumbent candidate for federal office was sent a questionnaire by MCFL seeking a response as to the candidate's position on the following issues: (1) passage of a constitutional Human Life Amendment to overturn the U.S. Supreme Court decisions legalizing abortion on demand; (2) support for legislation to prohibit the use of tax funds for abortions; and (3) support for legislation to provide positive alternatives to abortions. The "Y", "N" and "NR" designations refer to the candidate's responses to these three questions. Thus, there are three such designations next to each non-incumbent's name, one designation per question. "Y" indicates that the candidate's response supports the pro-life position; "N" indicates that the candidate's response opposes the pro-life position and "NR" indicates no response.

13. Was the procedure used in other MCFL tabloids?

A. Yes.

14. How often is the MCFL tabloid distributed? What is the date of the first MCFL tabloid distributed?

A. Since the first newspaper was printed in January, 1973, MCFL has printed a total of 37 newspapers.

1973—3

1974—5

1975—8

1976—8

1977—5

1978—4

1979—4 (to date)

15. Does MCFL accept contributions to be used in connection with federal elections? Does it make expenditures in connection with federal elections? What was the total of such contributions and expenditures during 1978?

A. MCFL accepts no contributions earmarked for use in connection with federal elections. It does use contributions to print newspapers which discuss among other matters, the voting records of incumbents and positions of non-incumbent on life issues. MCFL contends that it makes no "expenditure" in connection with federal elections as that term is used in the Federal Election Campaign Act of 1971.

16. Is MCFL registered with the state of Massachusetts as a political committee? If so, please

submit MCFL's statement of organization and any reports filed with the state of Massachusetts.

A. No. In 1976 MCFL did register as a political committee in connection with opposing a statewide referendum ballot question. Reports filed with the state are attached.

* * *

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NATIONAL PRESS CORPORATION
PRINTERS

251 CAUSEWAY ST., BOSTON, MASS. 02114

Phone CA 7-4970—Connecting All Depts.

To Mass. Citizens for Life DATE August 25, 1978
313 Washington Street
Newton, Mass. 02158

Terms: Net Cash Our No. 5541 Your Order No.

100,000	Election Edition—8 pages	\$2,113.75
	Paid	- 1,200.00
	Balance	\$ 913.75

[Illegible handwritten note]

173

NATIONAL PRESS CORPORATION
PRINTERS

251 CAUSEWAY ST., BOSTON, MASS. 02114

Phone CA 7-4970—Connecting All Depts.

DATE September 8, 1978

To Massachusetts Citizens for Life
313 Washington Street
Newton, Mass. 02158

Terms: Net Cash Our No. 5567 Your Order No.

20,000	Special Election Edition—4 pages	\$392.00
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[Illegible handwritten note]

Jean Weinberg
7 Dartmouth St
Somerville Mass 02145
(617) 628-4120

February 22, 1979

To Whom it May Concern,

I, Jean Weinberg, do hereby certify that I picked up the attached newsletter of the organization, Massachusetts Citizens for Life, at a statewide conference of the Massachusetts Chapter of the National Organization for Women. The Conference was held on Saturday, September 9, 1978, at the Anna Maria College in Worcester, Massachusetts. I am not a member of Massachusetts Citizens for Life, nor are any of the other participants in the conference with whom I was sitting. During the lunch break, held in the cafeteria of the college, there was a stack of about 200 of these "Special Election Edition" newsletters out on a counter for the public to pick up and read and take home. In addition, I know of at least one woman, who was also not a member of the organization, went to their statewide office in Newton and asked for additional copies for her friends. These copies were given to her with the knowledge that she and her friends did not belong to the organization.

/s/ Jean Weinberg
JEAN WEINBERG
7 Dartmouth St
Somerville Mass 02145

[SEAL OF NOTARY]

[Illegible] this 23rd [Illegible] February 1979

/s/ [Illegible]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT.

MOTION TO STRIKE OF DEFENDANT
MASSACHUSETTS CITIZENS FOR LIFE, INC.

Defendant, Massachusetts Citizens for Life, Inc. ("MCFL"), moves that this court strike the letter of Jean Weinberg, dated February 22, 1979, attached as *Exhibit B* to Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment. A copy of the letter is annexed hereto as *Exhibit A*.

As grounds therefor, MCFL states that Fed. R. Civ. P. 56(a) provides that a party may "move with . . . supporting affidavits for a summary judgment in his favor." If an "affidavit" is submitted, Fed. R. Civ. P. 56(e) requires that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The letter of Jean Weinberg fails to satisfy Fed. R. Civ. P. 56(a) and (e) because (i) it does not constitute an "affidavit" since it is not a sworn statement, (ii) it consists largely of hearsay statements that would not be admissible evidence at trial, and (iii) it contains self-serving conclusory statements that would not be admissible evidence at trial. The letter should, therefore, be stricken.

In order to qualify as an "affidavit," a writing must be sworn to before an officer authorized to administer oaths. *Galvin v. Town Clerk of Worcester*, 369 Mass. 175, 177 (1975); *Danis v. Bridge Enterprises, Inc.*, 8 Mass. App. Ct. 930 (1979); 10 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2738 at 702 (1973). Ms. Weinberg's letter, despite the existence of a notary's seal, nowhere indicates that she swore to the truth of the facts stated therein. The effect of the notarization is, at best, to acknowledge Ms. Weinberg's signature. In the absence of a jurat or other words indicating that the contents of the letter were sworn to, the letter fails to qualify as an affidavit for purposes of Fed. R. Civ. P. 56. See e.g., *Williams v. Pierce County Board of Commissioners*, 267 F.2d 866, 867 (9th Cir. 1959) (signed statement is not an affidavit when notary does no more than acknowledge execution); *Inmates, Washington City Jail v. England*, 516 F.Supp. 132, 138 (E.D. Tenn. 1980), *aff'd*, 659 F.2d 1081 (6th Cir. 1981) (a complaint, although notarized, does not qualify as an "affidavit" since it was not sworn to under oath); *Blum v. Campbell*, 355 F.Supp. 1220, 1227 (D.Md. 1972); *Miller Studio, Inc. v. Pacific Import Co.*, 39 F.R.D. 62, 65 (S.D.N.Y. 1965).

Ms. Weinberg's letter also must be stricken because it is comprised largely of hearsay statements which would not be admissible evidence at trial. See, e.g., *Maiorana v. MacDonald*, 596 F.2d 1072, 1080 (1st Cir. 1979); *Lyon Ford, Inc. v. Ford Motor Co.*, 342 F.Supp. 1339, 1343 (E.D.N.Y. 1971); Wright and Miller, *supra*, § 2738 at 689 n.26. In particular, the last two sentences of the letter, which refer to "one woman's" experience with MCFL, are clearly inadmissible hearsay under Fed. R. Evid. 802.

Finally, Ms. Weinberg's letter is based largely upon factually unsupported conclusory statements that certain persons were not "members" of MCFL. Since the letter fails to indicate the facts upon which Ms. Weinberg's conclusions are based, the conclusions fail to satisfy the "personal knowledge" and "admissible evidence" requirements of Fed. R. Civ. P. 56(e). Moreover, the letter fails to disclose the criteria by which Ms. Weinberg measured "membership" status. Since the scope of MCFL's "membership" is an important legal issue raised by the FEC's motion for summary judgment, it is clearly appropriate to strike Ms. Weinberg's conclusory statements on the "membership" status of the anonymous persons referred to in the letter. As stated in *Citizens Environmental Council v. Volpe*, 484 F.2d 870, 873 (10th Cir. 1973), affidavits which are "generalized, conclusory and unsubstantiated" should not be considered since "Rule 56(e), Fed. R. Civ. P., requires personalized affidavits." See also *Roslindale Cooperative Bank v. Greenwald*, 638 F.2d 258, 261 (1st Cir. 1981); *Union Insurance Society of Canton, Ltd. v. Wm. Gluckin & Co.*, 353 F.2d 946, 952 (2d Cir. 1965); *Cohen v. Ayers*, 449 F.Supp. 298, 321 (N.D. Ill. 1978).

By its attorneys,

/s/ Jeffrey R. Martin
Francis H. Fox
E. Susan Garsh
Alexandra Leake
Jeffrey R. Martin
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

DATED: November 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION
PLAINTIFF-APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.
DEFENDANT-APPELLEE.

MOTION OF THE CIVIL LIBERTIES UNION
OF MASSACHUSETTS FOR LEAVE TO FILE
A BRIEF AMICUS CURIAE

Pursuant to F.R.A.P. 29, the Civil Liberties Union of Massachusetts (CLUM) moves for leave to file a brief *amicus curiae* in support of the defendant-appellee. As reasons for this motion, CLUM states:

1. It has received the written consent of the appellee, Massachusetts Citizens for Life, Inc. (MCFL). That consent is attached to this motion as Exhibit 1. The appellant, Federal Election Commission (FEC), has refused to assent to the participation of CLUM as *amicus curiae*. The FEC's letter is attached hereto as Exhibit 2.

2. The FEC's assertion in its letter denying consent that "the district court determined that CLUM lacked the requisite interest for being heard as *amicus curiae*," is erroneous and has no support in the record. The district court denied CLUM's motion for

leave to file a memorandum in support of MCFL's motion for summary judgment without making any finding whatsoever about the quality of CLUM's interest in the case. As to CLUM, the district court simply wrote, "in light of plaintiff's opposition, motion denied." A copy of that order is attached hereto as Exhibit 3. See also J.A.-3.

3. The district court presumably denied leave for CLUM to participate as *amicus* on the basis of this court's statement in *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970), that "a district court lacking joint consent of the parties should go slow in accepting . . . an *amicus* brief . . ." (emphasis added). This statement, however, has no application to participation by *amici* at the appellate level, provision for which is specifically made by F.R.A.P. 29.

4. In this appeal, CLUM has not only its usual interest, as a defender of civil liberties, in the proper resolution of questions affecting freedom of speech; it has also a particular institutional interest in opposing the interpretation of the Federal Election Campaign Act urged by the FEC. That interest is set out in the affidavit of the CLUM Executive Director, John Roberts, which was initially filed with the district court in support of the motion to file a memorandum there, and a copy of which is attached hereto for the court's convenience as Exhibit 4.

5. As set forth in the affidavit of John Roberts, CLUM has a specific direct interest in this appeal. Although not itself incorporated, CLUM is the Massachusetts affiliate of the American Civil Liberties Union, Inc. (ACLU) and CLUM members automatically belong to the ACLU as well. Both CLUM and ACLU, like MCFL, and indeed like many other advocacy organizations, publish the voting records of legislators

and in those publications indicate whether or not the votes were consistent with the ACLU position. Despite the FEC's protestations to the contrary, the interpretation of 2 U.S.C. § 441b that it urges this court to adopt would have profound implications for CLUM and ACLU, as it would for numerous other political advocacy organizations that have been incorporated. See the decision of the district court, slip opinion at 11 (J.A. 492) (FEC's interpretation would render § 441b unconstitutional by applying the statute to "a nonprofitmaking corporation formed to advance an ideological cause and . . . for the purpose of publishing direct political speech").

6. In addition to its particular institutional interest in the outcome of this appeal, CLUM has a longstanding interest in and concern with the defense of freedom of speech, particularly speech concerning government and public affairs. CLUM and ACLU have participated either via direct representation or as *amici curiae* in numerous appeals involving freedom of speech generally as well as in the context of federal elections law. E.g., *Bose Corporation v. Consumers Union*, 104 S.Ct. 1949 (1984), affirming 692 F.2d 189 (1st Cir. 1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Rushia v. Ashburnham*, 701 F.2d 7 (1st Cir. 1983); *FEC v. Central L.I. TRIMM*, 616 F.2d 45 (2d Cir. 1980); *United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *ACLU v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973) (three judge court), vacated as moot sub nom. *Staats v. ACLU*, 422 U.S. 1030 (1975); *Batchelder v. Allied Stores Int'l.*, 388 Mass. 83 (1984). Indeed, defense of First Amendment rights and promotion of their unrestricted exercise has been CLUM's and the ACLU's

primary objective since their founding more than sixty years ago.

For the foregoing reasons, the Civil Liberties Union of Massachusetts respectfully requests leave to file a brief *amicus curiae*. Ten copies of the brief are conditionally filed with this motion.

By its attorney,

/s/ Marjorie Heins
MARJORIE HEINS
Massachusetts Civil Liberties
Union Foundation
47 Winter Street
Boston, MA 02108
(617) 482-3170

January 21, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Action No. 82-0609-G

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., DEFENDANT

AFFIDAVIT OF JOHN ROBERTS IN SUPPORT
OF THE MOTION OF AMICUS CURIAE CIVIL
LIBERTIES UNION OF MASSACHUSETTS
FOR LEAVE TO FILE A MEMORANDUM

I, John W. Roberts, do hereby depose and state:

1. I am Executive Director of the Civil Liberties Union of Massachusetts (CLUM), which is the state affiliate of the American Civil Liberties Union, Inc. (ACLU), a nonprofit nonpartisan corporation dedicated to defending rights guaranteed under the United States Constitution. CLUM members are also members of the national ACLU.

2. Both the ACLU and CLUM disseminate information about the voting records of legislators, indicating whether or not they voted in favor of or contrary to the civil liberties position. In August 1982 CLUM published in its newspaper, *The Docket*, information about the votes of all Massachusetts Senators on five issues of importance to the defense of civil liberties: the death penalty, public aid to

parochial schools, sale of handguns, therapeutic use of marijuana, and prisoners' rights. The voting records of all Massachusetts Representatives on six issues were also reported: the death penalty, aid to parochial schools, gay rights, the living will, court reform, and the call for a federal constitutional convention. *The Docket* states that CLUM does not rate legislators. A copy of the relevant pages of the August 1982 issue of *The Docket* is attached as Exhibit 1.

3. The publication of the ACLU's Washington office, *Civil Liberties Alert*, routinely reports on and rates federal legislators' voting performance on numerous issues important to the organization. A sample issue of *Civil Liberties Alert* containing these voting records is attached to the defendant's Request for Admissions as Exhibit HH. Both *The Docket* and *Civil Liberties Alert* are distributed to ACLU members as well as to the news media, public officials, and other interested persons.

4. In my work as Executive Director of CLUM, I have observed that numerous organizations comment on the performance of elected public officials. Some of these organizations are in corporate form. For example, the August/September issue of *The Citizen Advocate*, published by Massachusetts Fair Share, Inc., contained a strong attack on Governor King's performance, "Fair Share Looks at the King Record." *The Citizen Advocate* also advised that it did not support or oppose any candidate for public office. The relevant pages are attached as Exhibit 2.

5. Both the ACLU and CLUM constitution and bylaws prohibit support of or opposition to any candidate for elective office. This is a longstanding policy that is vital to our effectiveness. The ACLU and

CLUM believe that to promote civil liberties effectively they cannot take sides in partisan elections but must evaluate elected officials strictly on their records, and by doing so, seek to make all of them more sensitive to civil liberties concerns.

6. Neither CLUM nor any other state ACLU affiliate could set up a political committee as defined in the Federal Election Campaign Act. Not only would it contradict our constitution, bylaws, and philosophy, but it would violate our commitment to our members to preserve their associational privacy. Moreover, the FEC's reporting and disclosure requirements would not be possible for the ACLU to meet, since almost the entire lobbying program of the national and many state affiliates is devoted to commentary on the voting records and performance of legislators. There would be no way to separate out that part of our lobbying activity that the FEC might consider subject to regulation. For all of these reasons, the ACLU, if ordered to register as a political committee and disclose the names of the contributors, would almost surely cease its lobbying and educational work.

Signed under the pains and penalties of perjury this 17th day of September 1982.

/s/ John W. Roberts
JOHN W. ROBERTS

Sworn and subscribed before me, a notary public, on this 17th day of September, 1982

/s/ John Reinstein
Notary Public
My commission expires
12/12/86

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D.C. 20543

January 13, 1986

Mr. Charles N. Steele
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Federal Election Commission,
v. Massachusetts Citizens for Life, Inc.
No. 85-701

Dear Mr. Steele:

The Court today entered the following order in the above entitled case:

In this case probable jurisdiction is noted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

(4)
No. 85-701

Supreme Court, U.S.

FILED

FEB 27 1986

JOSEPH F. SPANIOLO, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR APPELLANT
FEDERAL ELECTION COMMISSION**

CHARLES N. STEELE *

General Counsel

RICHARD B. BADER

Assistant General Counsel

CAROL A. LAHAM

Attorney

Attorneys for

FEDERAL ELECTION COMMISSION

999 E Street, N.W.

Washington, D.C. 20463

(202) 376-8200

* Counsel of Record

February 27, 1986

46124

QUESTION PRESENTED

Whether Congress reached a permissible balance under the First Amendment to the Constitution of the United States in 2 U.S.C. § 441b, which requires all corporations and labor organizations to finance all of their expenditures in connection with federal elections from separate segregated funds containing contributions voluntarily designated for political purposes.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-701

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

*ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR APPELLANT
FEDERAL ELECTION COMMISSION**

OPINIONS BELOW

The July 31, 1985 opinion of the United States Court of Appeals for the First Circuit is published at 769 F.2d 13 and appears at J.S. App. 1a.¹ The June 29, 1984 decision of the United States District Court for the District of Massachusetts is published at 589 F. Supp. 649 and appears at J.S. App. 25a-38a.

¹ "J.S. App." references are to the appendix to the jurisdictional statement filed by the Federal Election Commission (hereafter "the Commission" or "the FEC"). "J.A." references are to the Joint Appendix, and "R." references are to the Record certified from the district court.

JURISDICTION

The final judgment of the court of appeals holding 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* (hereafter "the Act")² unconstitutional as applied, was entered July 31, 1985. The Commission filed a timely notice of appeal in the United States Court of Appeals for the First Circuit on August 28, 1985 (J.S. App. 40a-42a). On October 25, 1985, the Commission filed its jurisdictional statement, and on January 13, 1986 the Court noted probable jurisdiction. (J.A. 185). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 2101(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of 2 U.S.C. § 441b is reprinted at J.S. App. 75a-80a.

² The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), and by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act prohibits "any corporation whatever" or any labor organization from utilizing treasury funds to finance contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b(a). It permits, however, the use of such treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes. . . ." 2 U.S.C. § 441b(b)(2)(C). In turn, corporations and labor organizations are restricted to soliciting contributions to those separate segregated funds from a restricted class: for unions, members and their families, and for corporations, stockholders, executive and administrative personnel and their families, and members of membership corporations. 2 U.S.C. § 441b(b)(4). The statutory definition of "political committee" specifically includes separate segregated funds, 2 U.S.C. § 431(4)(B), so that they are governed by the same reporting and disclosure requirements applicable to other political committees. *See* 2 U.S.C. §§ 433 and 434.

On January 26, 1973, Massachusetts Citizens for Life, Inc. (hereafter "MCFL") was incorporated under the laws of the Commonwealth of Massachusetts as a non-stock, non-membership corporation (J.A. 92-96).³ Since its inception MCFL distributed a newsletter by mail to the 2,000 to 6,000 people who had contributed or paid dues to MCFL during the year of distribution (J.A. 23). Each of these newsletters bore a masthead identifying it as the "Massa-

³ In 1980, MCFL amended its articles of incorporation in order to become a membership corporation (J.A. 21-22, 109-110).

chusetts Citizen for Life Newsletter," as well as a volume and issue number (R., Vol. I, Pleading 17, Ex. B, pp. 1, 9, 25, 32, 50, 82, 112). They contained articles of interest to MCFL supporters, such as information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information (J.A. 88-89, 98-99).

In September of 1978, MCFL prepared and printed a flyer entitled "Special Election Edition" for distribution prior to the September 19, 1978, primary elections. Unlike the MCFL newsletter, which was never distributed to more than about 6,000 people (J.A. 24-27, 127-128), more than 100,000 copies of the Special Election Edition were printed for distribution (J.A. 172-173).⁴ This election flyer was edited by Marianne Rea-Luthin, an officer of MCFL who was never part of the staff that prepared the MCFL newsletters (J.A. 143).⁵ The Special Election Edition was mailed free of charge and without request to 5,986 people who had contributed or paid dues to MCFL and to 50,674 other people whom MCFL considered to be sympathetic to its goals (J.A. 18-27, 128). The remaining copies apparently were distributed publicly (J.A. 174).

⁴ The May, 1978, newsletter was Volume 5, Number 6 and concluded a Volume which had begun in January 1977. During discovery in this case, MCFL represented that the Special Election Edition distributed in September, 1978, was "Volume 5, Number 3" of its newsletter (J.A. 163). However, the copy of the Special Election Edition given to the Commission during discovery had "Volume 5, Number 3" written in by hand (R., Vol. I, Pleading 17, Ex. B at 144), and the actual Volume 5, Number 3 newsletter, distributed in May-June, 1977, is also in the Record (R., Vol. I, Pleading 17, Ex. B at 120).

⁵ Ms. Rea-Luthin was director of the separate segregated fund MCFL established in 1980 (J.A. 22).

The front page of the flyer was captioned "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." (R., Vol. I, Pleading 16, Ex. A at p. 1). It warned that "[n]o pro-life candidate can win in November without your vote in September," and requested the reader to join "in voting in the primary and together let us make our votes shout against the continuing killing of the unborn." The back page of the flyer had "VOTE PRO-LIFE" written on it in large bold-faced capital letters. This exhortation was part of a coupon which was to be clipped out and taken to the polls with the name of the pro-life candidates in the reader's district filled in. To facilitate this choice, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL considered the pro-life position on three issues highlighted by the flyer. A "y" meant the candidate supported the pro-life view of the issue and an "n" meant the candidate opposed it. An asterisk was placed next to the names of certain incumbent candidates to indicate their "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." The flyer also featured the pictures of thirteen candidates out of the more than 400 running for office. Each candidate featured had received a triple "y" rating or was identified either as having a 100% pro-life voting record or as having stated a pro-life position. No candidate was pictured who had received even one "n" rating.

MCFL expended \$9,812.76 to prepare, print and distribute the Special Election Edition (J.A. 9). This entire amount was paid from the corporation's general treasury funds (J.A. 9), for MCFL did not

establish a separate segregated fund until 1980 (J.A. 309-310).

B. The Commission Proceedings

On May 1, 1979, a complaint was filed with the Commission alleging that MCFL had violated the Act by utilizing corporate funds to distribute the Special Election Edition to the public. On June 27, 1979, the Commission found reason to believe that MCFL had violated 2 U.S.C. § 441b(a) and initiated an investigation. On October 21, 1980, the Commission found probable cause to believe that MCFL had violated 2 U.S.C. § 441b(a) by using corporate funds to prepare, print and distribute its Special Election Edition to members of the general public. After the Commission's attempt to conciliate failed to produce an acceptable agreement, the Commission authorized the filing of this civil enforcement action pursuant to 2 U.S.C. § 437g(a)(6)(A). (J.S. App. 43a-47a).

C. Proceedings Before the District Court

On February 22, 1982, the Commission filed its complaint in this case, seeking a civil penalty as provided in 2 U.S.C. § 437g(a)(6), and such other relief as the court deemed appropriate (J.S. App. 47a). MCFL admitted that it had expended corporate funds to prepare, print and distribute the Special Election Edition and Complimentary Partial Copy (distributed to correct some errors) as alleged, but claimed that this was not an unlawful "expenditure" under the Act, and that 2 U.S.C. § 441b was unconstitutional if it was (J.A. 8-14). Both parties filed motions for summary judgment and on June 29, 1984, the district court granted summary judgment in favor of MCFL, concluding on several grounds that MCFL's expenditure of corporate funds did not vio-

late section 441b (J.S. App. 30a-34a). The district court also opined that if MCFL's expenditures did violate the Act, application of section 441b to MCFL's expenditures "would violate its rights to freedom of speech, press and association" (J.S. App. 38a).

D. Proceedings in the Court of Appeals

The court of appeals rejected the district court's conclusion that MCFL's expenditures were not covered by 2 U.S.C. § 441b, and found that those expenditures violated section 441b as alleged by the Commission. First, the court held that both the language and legislative history confirmed that section 441b was intended to prohibit corporations from using treasury funds to make independent election expenditures like those in this case. Second, the court reasoned that since the "Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley [v. Valeo]*, 424 U.S. 1 (1976)]" there was no need to decide whether or not section 441b reached expenditures that do not involve "express advocacy" (J.S. App. 16a). Finally, the court held that the Special Election Edition did not fall within the statutory exemption for certain activities by the communications media.⁶ The court found that, whether or not the regular MCFL newsletter was a periodical publication under the exemption, the Special Election Edition was not "be-

⁶ 2 U.S.C. § 431(9)(B)(i) excludes from the definition of "expenditure"

any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. . . .

cause the editions were not distributed through the newsletter's facilities, were not published by the newsletter staff, did not contain the newsletter masthead, and were not limited to the usual MCFL newsletter circulation" (J.S. App. 18a-19a).

The court affirmed the district court's judgment in favor of MCFL, however, because it concluded that section 441b is unconstitutional as applied to expenditures by nonprofit, "ideological" corporations like MCFL (J.S. App. 24a). The court recognized that section 441b does not restrict corporate expenditures so long as they are financed through a separate segregated fund, but found that the statute infringed the corporation's first amendment rights by eliminating the "simplest method" of financing such expenditures without a compelling governmental interest for doing so. The court found the compelling interests behind section 441b to be inapplicable because it believed that MCFL's expenditures in this case did not pose the risks to the "integrity of the electoral process" which section 441b was designed to prevent (J.S. App. 21a-22a). For these reasons, the court of appeals found that section 441b was unconstitutional as applied to expenditures by a nonprofit, "ideological" corporation (J.S. App. 24a).

SUMMARY OF ARGUMENT

A. The Court Of Appeals Properly Found That Appellee Violated 2 U.S.C. § 441b

A provision of the Federal Election Campaign Act, 2 U.S.C. § 441b, prohibits "any corporation whatever" from using its corporate treasury funds to make expenditures in connection with a federal election. Appellee Massachusetts Citizens for Life, Inc. is a nonprofit corporation, and it violated section 441b

when it expended \$9,812.76 from its corporate treasury to distribute a flyer to the general public which expressly advocated that readers "vote pro-life" and identified by name which candidates in the upcoming primary elections it believed to have taken a "pro-life" position and which candidates it believed had opposed that position.

MCFL's election flyer was not exempt from section 441b as a "periodical publication" under 2 U.S.C. § 431(9)(B)(i) even if MCFL's newsletter was, because it was not prepared or distributed through the facilities of MCFL's newsletter and because it was distributed primarily to members of the public who had never received MCFL's newsletter. The flyer also was not beyond the coverage of section 441b merely because MCFL did not coordinate its distribution with any candidate's campaign. Indeed, this Court recognized in *United States v. UAW*, 352 U.S. 567 (1957), that Congress' primary purpose in extending the statutory prohibition to union and corporate "expenditures" in addition to "contributions" was precisely to reach such election expenditures made independently of a candidate's own campaign. Accordingly, the court of appeals properly found that MCFL's expenditure violated 2 U.S.C. § 441b.

B. Section 441b Is Not Unconstitutional

The court of appeals erred in concluding that application of section 441b to expenditures by nonprofit corporations violates the first amendment. Section 441b does not restrict the amount, content or methods of corporate and union political speech. The Act permits a corporation to utilize its treasury funds to establish a separate segregated fund to be used for political purposes, which can be funded by voluntary

contributions for that purpose by the individuals who make up the corporation or union. Such a fund can be completely controlled by the corporation or union, so long as its money is kept in a separate account. The corporation or union can then use the separate segregated fund to make contributions to federal candidates and to make unlimited expenditures to inform the public of its views on federal candidates. Thousands of corporations and unions have successfully utilized separate segregated funds to make millions of dollars in contributions and expenditures in connection with federal elections. Thus, unlike statutes limiting political spending which this Court has found unconstitutional, section 441b has neither the intent nor the effect of limiting corporate and union political speech.

Even if section 441b were found to have an indirect effect on corporate and union political expression, it would not be unconstitutional since it is supported by several governmental purposes which this Court has found to be compelling. In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), this Court found two purposes underlying this provision to be compelling enough to overcome the first amendment objections of the nonprofit, ideological corporation in that case. First, the Court found section 441b serves to protect the integrity of the electoral process from the undue influence that could be exerted by aggregations of money accumulated through use of the corporate form. Since the Court found the provision to be a prophylactic measure properly aimed at the potential for such influence inherent in the corporate form of organization, the actual effect on an election of MCFL's particular expenditure is irrelevant to the constitutionality

of this application of section 441b. Second, this Court found that section 441b protects individuals whose money goes to make up a corporation's treasury from having that money used to support political candidates to whom they may be opposed. This protection is also applicable to MCFL, for there is no basis for assuming that everyone who supports MCFL's anti-abortion education and lobbying efforts would automatically choose the candidates they support solely on that basis.

Finally, application of section 441b to MCFL is supported by Congress' interest in ensuring that the electorate is fully informed about the sources of campaign financing. In *Buckley v. Valeo*, 424 U.S. at 81, this Court found this interest to be compelling even for independent expenditures, since it helps voters define the candidates' constituencies. Section 441b serves this interest by requiring unions and corporations to make their campaign expenditures from a separate segregated fund which is required to report the names of its contributors just like any other political committee. If nonprofit corporations were permitted to make campaign expenditures from their treasury funds without reporting the sources of those funds, such corporations could be used as vehicles through which commercial corporations and unions could funnel unlimited amounts of their treasury funds into expenditures to influence federal elections, without ever disclosing to the public the true source of the funds.

In sum, over the last 80 years Congress has carefully developed section 441b into a balanced statute which serves important governmental purposes with a minimum of interference with corporate and union political activities. Congress' considered judgment

that this statute represents an appropriate balance between these competing interests is entitled to substantial deference from this Court, and there is nothing in the record of this case that would provide sufficient grounds to reject that judgment.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT MCFL VIOLATED 2 U.S.C. § 441b BY EXPENDING CORPORATE TREASURY FUNDS TO DISTRIBUTE THE SPECIAL ELECTION EDITION TO THE PUBLIC

Section 441b prohibits "any corporation whatever" or any labor organization from making a "contribution or expenditure in connection with any election" for federal office, "or in connection with any primary election . . . held to select candidates" for federal office. In this case, MCFL's violation of that provision is established by uncontested facts. As discussed *supra*, pp. 3-5, MCFL is a corporation organized under the laws of Massachusetts, and it admittedly expended \$9,812.76 from its corporate treasury to pay for the printing and distribution of the Special Election Edition in connection with the 1978 primary election.⁷ The Special Election Edition expressly

⁷ It is uncontested in this case that section 441b applies to nonprofit, issue-oriented corporations like MCFL. The provision explicitly states that it applies to "any corporation whatever," without exception. See 89 Cong. Rec. 5781 (1943) (remarks of Cong. Hatch) ("[T]he language further says 'or any corporation whatever.' Mr. President, that language is about as broad as language can be . . ."). One of the groups studied by a special committee established by the House of Representatives in the 1940's to investigate campaign expenditures was American Action, Inc., which "claim[ed] to be motivated by patriotic purposes and to seek no personal gain. . . ."

urged readers to "vote pro-life" in the upcoming primary elections, and identified by name each candidate who supported what MCFL considered the pro-life position and each candidate who was opposed to that position. As the court of appeals found, whatever else section 441b might apply to, it clearly is applicable to a corporation's expenditure of its treasury funds to distribute this sort of explicit election advocacy to the public.

Report of the Special Committee to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 42 (1946). The Committee concluded that "American Action, Inc., is a Delaware corporation and, as such, under the Federal Corrupt Practices Act, is prohibited from making any contributions in connection with any election at which a Representative to Congress is to be chosen." *Id.* at 42-43. Senator Taft confirmed during the Senate debate on the 1947 Amendments to the Corrupt Practices Act (see pp. 15-16, *infra*) that the prohibition would apply to a corporation established for religious purposes. 93 Cong. Rec. 6440 (1947), reprinted in II NLRB, *Legislative History of The Labor Management Relations Act, 1947*, at 1535 (1948). In proposing the amendments to this statute that were adopted in 1971, Congressman Hansen also noted that the provision would apply to such nonprofit corporations as the National Association of Manufacturers and the American Medical Association. 117 Cong. Rec. 43,380 (1971), reprinted in FEC, *Legislative History of the Federal Election Campaign Act of 1971*, at 758 (1981) (hereafter "1971 Leg. Hist."). Finally, in 1975 the Commission issued Advisory Opinion 1975-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5111 (Aug. 19, 1985), which concluded that section 441b would apply to nonprofit, issue-oriented corporations such as an incorporated post of the Veterans of Foreign Wars. Congress effectively adopted this interpretation by reenacting the statutory language a year later without material change. See *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

The fact that MCFL apparently did not coordinate its expenditure with any candidate's campaign organization does not exempt it from the prohibition of section 441b. To the contrary, this Court determined long ago that the prohibition of corporate and union "expenditures" was added to section 441b's predecessor in 1947 for the purpose of reaching expenditures in connection with federal elections that were claimed to be independent of a candidate's campaign. In *United States v. UAW*, 352 U.S. 567 (1957), this Court reviewed a district court's dismissal of an indictment which "charged appellee with having used union dues [contained in its treasury] to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections." *Id.* at 585. The indictment in that case did not allege that the union's expenditures had been approved by or coordinated with any candidate. Nevertheless, this Court reversed the district court's decision and found that the indictment contained all the elements necessary to allege a violation of the statute.

To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations.

Id. at 585 (brackets in original).

The history of the statute referred to by the Court consisted primarily of the reports of special committees established by both houses of Congress after World War II to investigate and make recommendations on amendments to the existing campaign finance laws.* Among the problems uncovered by these committees was the ability of unions, after they were brought under the prohibition on federal campaign contributions in 1943, to evade the intent of the statute by making expenditures of their own money to advocate the election of their favored candidates, instead of contributing to the candidates' own campaigns. Report of the Special Committee to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 39-40 (1946); Investigation of Senatorial Campaign Expenditures, S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 38-39 (1947). To remedy this problem, the House Committee recommended that the statute "be clarified so as to specifically provide that expenditures . . . by the prohibited organizations in connection with elections, constitute vio-

* Prior to 1943, only corporate contributions to federal candidates of "anything of value" were prohibited by the Federal Corrupt Practices Act of 1925, 43 Stat. 1070. The War Labor Disputes Act of 1943, 57 Stat. 167, extended this prohibition to unions, but this statute was only effective for the duration of the war. Thus, special committees were established because it was clear that postwar legislative action would be necessary in this area. The rest of the long history of section 441b and its predecessors, dating back to 1907, has been reviewed by this Court in a number of cases and need not be repeated here. See *United States v. CIO*, 335 U.S. 106, 112-120 (1948); *United States v. UAW*, 352 U.S. at 570-584; *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 402-432 (1972); *FEC v. National Right to Work Committee*, 459 U.S. at 208-209.

lations of the provisions of said section, *whether or not said expenditures are with or without the knowledge or consent of the candidates.*" H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46 (emphasis added), *quoted in United States v. UAW*, 352 U.S. at 582. The Senate Committee urged a similar amendment. S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 38-39. Section 304 of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), 61 Stat. 136, incorporated these recommendations, permanently applying the prohibition to labor organizations as well as corporations and extending it to prohibit "expenditures" as well as contributions. *See United States v. UAW*, 352 U.S. at 583-584. In the *UAW* decision this Court concluded, on the basis of this legislative history, that Congress' primary purpose in adding the prohibition of "expenditures" to the statute in 1947 was to ensure that it reached a corporation's or union's independent expenditure of its own funds to influence the outcome of a federal election.

As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe "expenditures." . . . Because such conduct was claimed to be merely "an expenditure [by the union] of its own funds to state its position to the world," the Senate and House Committees recommended and Congress enacted, as we have seen, the prohibition of "expenditures" as well as "contributions" to "plug the existing loophole."

Id. at 585 (brackets in original).

This Court's conclusion in the *UAW* case remains as valid today as when that case was decided. Although Congress has amended section 441b and its predecessor (former 18 U.S.C. § 610) twice since then, it has never indicated any intent to overrule the *UAW* decision or to narrow the scope of the prohibition of "expenditures" by corporations and unions in connection with federal elections. To the contrary, Congressman Hansen, the author of the 1971 amendment to 18 U.S.C. § 610, expressly affirmed that "section 610 as it stands, and under my proposal, represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking." 117 Cong. Rec. 43,380 (1971), 1971 *Leg. Hist.* at 753. Similarly, Senator Cannon, the floor manager of the 1976 bill which transferred the provision prohibiting corporate expenditures, with some modifications, from the criminal code to the Federal Election Campaign Act (codified at 2 U.S.C. § 441b), stated that "if [corporations or unions] are trying to elect or defeat someone for Federal office they are not exempt." 122

* See also 117 Cong. Rec. 43,381 (remarks of Rep. Hansen), 1971 *Leg. Hist.* at 759, *quoted in Pipefitters v. United States*, 407 U.S. at 431; 117 Cong. Rec. 43,384-385 (remarks of Reps. Thompson and Udall), 1971 *Leg. Hist.* at 762-63; 117 Cong. Rec. 43,386 (remarks of Rep. Crane), 1971 *Leg. Hist.* at 764; 117 Cong. Rec. 43,389 (remarks of Rep. Steiger) ("the evil" section 610 was intended to correct was the "use of union funds to influence the public at large to vote for a particular candidate or a particular party"), 1971 *Leg. Hist.* at 767; 117 Cong. Rec. 43,409 (remarks of Rep. Conte), 1971 *Leg. Hist.* at 787; 117 Cong. Rec. 28,814 (remarks of Sen. Prouty), 1971 *Leg. Hist.* at 460.

Cong. Rec. S3556 (daily ed. March 16, 1976), reprinted in FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976*, at 388 (1977).

Finally, MCFL's Special Election Editions are not exempt from the prohibition of section 441b as a periodical publication under 2 U.S.C. § 431(9)(B) (i). As the court of appeals found, even if MCFL's newsletters were considered to be periodical publications under the Act, the evidence in the record shows that the Special Election Edition was neither published nor distributed "through the newsletter's facilities" (J.S. App. 18a-19a). Rather than a periodical publication distributed to the newsletter's normal readers, the Special Election Editions were simply political flyers, most of which were distributed to members of the public who had never received the MCFL newsletter, in order to influence their votes in the upcoming primary election. If flyers like these were within the news media exemption it would virtually eliminate section 441b's prohibition on expenditures, for it would permit any of the many corporations and unions that operate house organs to use their treasury funds to distribute unlimited express election advocacy to the general public.

In sum, it is clear that the court of appeals was entirely correct when it concluded (J.S. App. 15a) that MCFL's expenditure of corporate treasury funds to distribute the Special Election Edition to the public violated 2 U.S.C. § 441b. As we show below, however, the court of appeals erred when it concluded that this application of section 441b is unconstitutional.

II. CONGRESS DID NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING ALL CORPORATIONS AND UNIONS TO SEGREGATE, AND PUBLICLY DISCLOSE THE SOURCES OF, THE FUNDS CONTRIBUTED BY THEIR CONSTITUENTS FOR FEDERAL ELECTORAL ACTIVITY

As we demonstrate *infra*, pp. 30-31, 32-33, the reasoning underlying the court of appeals' determination that section 441b is unconstitutional as applied to election expenditures by nonprofit, ideological corporations rests largely upon the court's view that regulation of such activity is not necessary to protect the integrity of the electoral process. It is well settled, however, that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 469 (1981), quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), and that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one [group] . . . casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 103 (1973).

[First Amendment] cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Dennis v. United States, 341 U.S. 494, 539-540 (1951) (Frankfurter, J., concurring). Accordingly, this Court has long recognized that congressional enactments such as section 441b are entitled to a pre-

sumption of constitutionality, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), which is enhanced in this case not only because of Congress' special expertise and experience with election campaigns, but also because this Court has already found the bulk of section 441b's scheme for regulating corporate and union campaign spending to be constitutional as applied to a nonprofit, issue-oriented corporation. *FEC v. National Right to Work Committee*, 459 U.S. at 207-211.

As we show below, the court of appeals identified no concern adequate to overcome this presumption of constitutionality in this case, for the application of section 441b to expenditures by nonprofit corporations does not unduly restrict either the amount or manner of their political expression, and it is supported by several governmental interests that this Court has previously found to be compelling enough to overcome similar constitutional objections.

A. Section 441b Does Not Restrict Corporate Political Speech

As stated by the sponsor of the 1971 amendments to the predecessor of section 441b, Congress did not intend for that provision to prevent corporations and unions from publishing their views on federal elections, but only to prohibit "the use of corporate and union *treasury funds* to reach the general public in support of, or opposition to, Federal candidates" 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen) (emphasis added), *quoted in Pipefitters v. United States*, 407 U.S. at 431. To make this limited purpose clear, Congress in 1971 enacted an explicit exception from the statute's prohibitory language, proposed by Congressman Hansen and currently codified at 2 U.S.C. § 441b(b)(2)(C), which allows cor-

porations and unions to use their treasury funds to operate a voluntary separate segregated fund for political purposes. A "separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *FEC v. National Right to Work Committee*, 459 U.S. at 200 n.4. *See also Pipefitters v. United States*, 407 U.S. at 414-417. Such separate segregated funds have been aptly described as nothing more than the "political arms of the parent organizations."¹⁰ The corporation or union operating the fund can use its own treasury money to pay the fund's administrative costs and to solicit contributions from the corporation's or union's members, stockholders and executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(4). Thus, unlike any other political committee, they can turn every dollar of contributions they collect into political contributions or expenditures. *See California Medical Association v. FEC*, 453 U.S. 182, 199 n.19 (1981).

It is, therefore, clear that section 441b has been carefully limited to restricting only the use of a corporation's or union's treasury funds to influence federal elections. Through its separate segregated fund, a corporation or union can contribute up to \$5,000 directly to any federal candidate and make unlimited independent expenditures communicating to the public the corporation's or union's support for, or opposition to, any candidate. In fact, section 441b would not prohibit MCFL's distribution of the same election

¹⁰ *Bread Political Action Committee v. FEC*, 635 F.2d 621, 624 n.3 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982).

flyers to the same people in the same manner it did here, so long as it was financed through a separate account containing contributions voluntarily designated for political purposes.¹¹

This statutory balance was not arrived at haphazardly. Over an 80 year period Congress has carefully developed the statutory scheme now contained in section 441b "in a 'cautious advance, step by step. . .'" *FEC v. National Right to Work Committee*, 459 U.S. at 209, quoting *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937). In particular, when it added to the statute in 1971 the explicit exceptions permitting the establishment of separate segregated funds, Congress focused upon the problem of balancing the statute's objectives against the constitutional concerns identified in this Court's opinions construing section 441b's predecessors. As summarized by Congressman Hansen when he introduced this amendment on the floor of the House of Representatives,

[T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy

¹¹ MCFL has argued (Motion to Affirm at 10) that, even though it has reported making expenditures through its separate segregated fund in every election since 1980, it could not have done so in 1978 because at that time it had no members within the meaning of 2 U.S.C. § 441b(b) (4) (C) from whom it could have solicited contributions. However, 2 U.S.C. § 441b (b) (4) (A) (i) would have permitted MCFL to solicit up to \$5,000 for a separate segregated fund from each of its executive and administrative officers and their families. More importantly, MCFL's lack of bona fide members was a self-imposed restriction which MCFL itself chose to include in its articles of incorporation. MCFL apparently had little difficulty in removing this restriction in 1980 when it decided to establish its separate segregated fund.

and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject . . . and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language.

117 Cong. Rec. 43,381 (1971), 1971 Leg. Hist. at 759, quoted in *Pipefitters v. United States*, 407 U.S. at 431. This explicit Congressional determination that the regulations now contained in section 441b are an appropriate way to attain important governmental objectives in light of the constitutional concerns identified by this Court "warrants considerable deference" from the courts. *FEC v. National Right to Work Committee*, 459 U.S. at 209, citing *Rostker v. Goldberg*, 453 U.S. 57, 64, 67 (1981). See also, e.g., *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-3189, 3193 (1985); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 103.

Nothing in the record of this case justifies the court of appeals' decision to override Congress' considered judgment that the financial regulations contained in 2 U.S.C. § 441b represent a permissible constitutional balance. As accurately predicted in *Pipefitters v. United States*, 407 U.S. at 443 (Powell, J., joined by Burger, C.J., dissenting), the explicit authorization of the sort of separate segregated funds described in that decision has "open[ed] the way for major participation in politics by the largest aggrega-

tions of economic power, the great unions and corporations." During the 1983-84 election cycle more than 2900 separate segregated funds established by corporations and unions reported making \$169.1 million in contributions and expenditures out of \$185.6 million they received in voluntary political contributions. See *FEC Reports on Financial Activity 1983-1984*, Vol. I, p. 78 (May 1985).¹² There is no evidence that any corporation or union has been unable to adequately publicize its political views through a separate segregated fund; even MCFL itself has established a separate segregated fund through which it has made political expenditures in every election since 1980. This graphically demonstrates that, in contrast to the statutes this Court found unconstitutional in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775-795 (1978); *Buckley v. Valeo*, 424 U.S. at 39-59; and *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459, 1465-1471 (1985), section 441b has neither the purpose nor the effect of limiting the free flow of political information and opinion from corporations and unions to the public.

The court of appeals nevertheless found the statute unconstitutional because it eliminated what the court considered "the simplest method" (J.S. App. 20a) of financing corporate speech, apparently referring to

¹² This reflects tremendous growth in both the number and spending of separate segregated funds. As recently as the 1975-76 election cycle there were 853 separate segregated funds which reported expending only \$26 million. See *FEC Disclosure Series No. 8: Corporate-Related Political Committees Receipts and Expenditures, 1976 Campaign*, p. 8 (1977), and *FEC Disclosure Series No. 10: Labor-Related Political Committees Receipts and Expenditures, 1976 Campaign*, p. 6 (1978).

the inconvenience involved in establishing and operating a separate segregated fund in accordance with the Act's administrative requirements for political committees, 2 U.S.C. §§ 432-434. Since section 441b leaves the amount and content of a separate segregated fund's expenditures unrestricted, however, these regulations alone do not constitute a first amendment violation, for "it is well settled that '[t]he [First] Amendment does not forbid . . . regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.'" *Lowe v. SEC*, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring), quoting *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 193 (1946). See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2282 n.14 (1985) ("the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed"). The court of appeals cited no case in which this Court has ever found a statute which did not limit speech to violate the first amendment merely because it regulated the task of financing it.¹³

As noted, the requirements of 2 U.S.C. §§ 432-434 are applicable to *all* political committees as defined in the Act, which includes, in addition to separate

¹³ *Linmark Associates v. Willingboro*, 431 U.S. 85, 93-94 (1977) and *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974), relied upon by the court of appeals (J.S. App. 20a-21a), are not on point. In those cases the Court concluded that the availability of alternative means of communicating did not save statutes that prohibited a particular method of speech. Section 441b does not affect the method of communication employed by corporations and unions; so long as it is financed out of a separate segregated fund, a corporation or union can utilize any methods of communication it desires.

segregated funds, "any . . . group of persons" which makes more than \$1,000 in election expenditures during a calendar year. 2 U.S.C. § 431(4)(A). The court of appeals suggested no reason why, merely because it is a corporation, MCFL has a first amendment right to make group political expenditures on behalf of its supporters without the inconvenience of complying with these regulations, while other groups of individuals who have not incorporated do not. In fact, this Court's decisions indicate that, far from enjoying such a privileged position, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they enjoy as individuals." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1468, citing *FEC v. National Right to Work Committee*, 459 U.S. at 209-210. See also *United States v. Morton Salt Company*, 338 U.S. 632, 653 (1950). Thus, in *Regan v. Taxation With Representation*, 461 U.S. 540, 543-546 (1983), this Court found no first amendment violation in Congress' decision to require that a group choosing to incorporate to obtain the tax benefits of 26 U.S.C. § 501(c)(3) must establish a separate affiliated corporation to finance its lobbying activities. As in *Regan*, where the group's expenditures on lobbying remained unrestricted so long as they were financed solely through contributions to the separate affiliated corporation, under section 441b corporate political expenditures remain unrestricted so long as they are financed solely through contributions to a separate segregated fund.

The court of appeals' assertion (J.S. App. 21a n.7) that the first amendment requires a general exemption from section 441b for corporations like

MCFL because of the statute's requirement that the names of large contributors to all political committees, including separate segregated funds, be disclosed to the voting public, was effectively rejected by this Court long ago. In *Buckley v. Valeo*, 424 U.S. at 68, this Court upheld the Act's reporting requirements against first amendment attack as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." The Court then rejected the argument that the first amendment entitles fringe groups to a blanket exemption from the reporting requirement, and ruled that exemption from the Act's reporting requirements is constitutionally mandated only if a group presents specific evidence that its contributors are likely to be subjected to harassment if their names are disclosed. *Id.* at 72-74. See also *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91-98 (1982). MCFL has never attempted to make such a showing, and the court of appeals did not explain why this Court's holding in *Buckley* would not be as applicable to MCFL as to any other group.¹⁴

¹⁴ The court of appeals' further observation (J.S. App. 21a n.7) that some corporations might not find the separate segregated fund option palatable because they have chosen to be nonpartisan, is not relevant to this case. Since MCFL actually established a separate segregated fund in 1980, which has been active in every election since, it is clear that MCFL cannot claim that establishing a separate segregated fund is contrary to its principles. Moreover, as shown *supra*, pp. 5, 7, 12-13, the court of appeals correctly concluded (J.S. App. 16a) that the expenditure in this case was for a flyer that expressly advocated the election or defeat of specified federal candidates. If a case ever arises in which the Commission charges a non-profit corporation with violating section 441b by making an

In sum, there has been no showing in this case that section 441b has interfered with the freedom of any corporation or union to expend as much as it wants, through a separate segregated fund, to publicize its views on federal candidates. In the absence of such a showing, there is no basis for this Court to overrule the considered judgment of Congress that section 441b is consistent with the requirements of the first amendment.

B. The Compelling Governmental Purposes Which This Court Has Found To Support Section 441b Are Applicable To Expenditures By Nonprofit Corporations

We have shown above that section 441b has neither the intent nor the effect of restricting the amount, content or methods of corporate and union political expression. However, even if the court of appeals were correct in concluding that section 441b indirectly burdens speech by making fundraising less "simple," the statute would still not be unconstitutional.

[I]t is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v. [National Ass'n of] Letter Carriers*, 413 U.S. 548, 567 (1973). Even a "significant interference" with protected rights of political association may be sustained if the State demonstrates a sufficiently important in-

expenditure to publish a nonpartisan statement, the applicability of section 441b in such circumstances can be resolved at that time; it is not presented by this case. See *California Medical Association v. FEC*, 453 U.S. at 197 n.17. We note, however, that the Commission has adopted regulations providing that section 441b is inapplicable to the distribution of candidates' voting records in a truly nonpartisan manner. 11 C.F.R. § 114.4(b) (4).

test and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.

Buckley v. Valeo, 424 U.S. at 25, quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975). Accord, *FEC v. National Right to Work Committee*, 459 U.S. at 207.

In *FEC v. National Right to Work Committee*, this Court discussed two governmental interests behind section 441b which it found to be sufficiently compelling to overcome the first amendment claims of a non-profit, issue-oriented corporation. First, as the Court described it last Term, "in *NRWC* we held that the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form. . . ." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1471. See also *FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*, 352 U.S. at 579. The *NRWC* case thus "turned on the special treatment historically accorded corporations." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1468. Corporations are artificial entities whose accumulation of capital is enhanced by such special advantages as limited liability, perpetual life, and special tax treatment. As such, corporations "are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *United States v. Morton Salt Co.*, 338 U.S. at 652. Such "[f]avors from government often carry with them an enhanced measure of regulation." *Id.* Accord, *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1469.

As the Court has explained,¹⁵ Congress acted to prevent the use of the general assets of corporations and unions to influence federal elections only after it became aware of widespread abuses that were thought to present imminent danger of corruption to the federal election process, resulting in a decline of public confidence in the integrity of elected officials and the fair operation of government. This Court has repeatedly recognized the elimination of such circumstances to be a governmental interest of the highest order,¹⁶ and has found that Congress' "careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *FEC v. National Right to Work Committee*, 459 U.S. at 209.

The court of appeals' conclusion that this interest was inapplicable here rested upon its view that MCFL's expenditures in this case "did not incur any political debts from legislators" (J.S. App. 22a). However, in *National Right to Work Committee*, this Court refused to evaluate the constitutionality of section 441b by focusing narrowly upon either the particular attributes of the corporation or the effects of the particular expenditures before the Court, as the court of appeals had done. Instead, the Court upheld the constitutionality of section 441b as applied to the nonprofit, ideological corporation in that case

¹⁵ *FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*, 352 U.S. at 570-584.

¹⁶ See, e.g., *FEC v. National Right to Work Committee*, 459 U.S. at 208; *First National Bank of Boston v. Bellotti*, 435 U.S. at 788 n.26; *Buckley v. Valeo*, 424 U.S. at 27; *United States v. UAW*, 352 U.S. at 570, 571, 575.

because it is a "prophylactic measure[]" which is permissibly aimed at "the special characteristics of the corporate structure." *FEC v. National Right to Work Committee*, 459 U.S. at 209.

While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation.

Id. at 210. MCFL's corporate structure carries the same potential for influencing elections as NRWC's since both are nonprofit, issue-oriented corporations. Plainly, the court of appeals' conclusion that MCFL's status as a "nonprofit, ideological" corporation protects it from application of this prophylactic statute cannot be reconciled with this Court's holding to the contrary in *National Right to Work Committee*.

The second purpose behind section 441b "is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Committee*, 459 U.S. at 208. By ensuring that individuals have the opportunity to make an informed and voluntary choice as to whether their money will be used by others to support political candidates, section 441b serves to safeguard the individual's first amendment interest in not being required to contribute to the support of any political candidates without his or her consent.¹⁷ It also furthers the important governmen-

¹⁷ See generally *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

tal interest in "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" by guaranteeing each individual the opportunity to make a personal decision about the election options he or she will support. *First National Bank of Boston v. Bellotti*, 435 U.S. at 788-789, quoting *United States v. UAW*, 352 U.S. at 575. The Court's recognition of the validity of this Congressional purpose behind section 441b in *National Right to Work Committee*, a case challenging its applicability to a nonprofit, issue-oriented corporation, demonstrates that the court of appeals here erred when it concluded that this purpose is inapplicable to such corporations.

The court of appeals rejected the Commission's reliance upon this second purpose behind section 441b because it believed that MCFL's contributors do not need this sort of protection. This view was not supported by any evidence; the court itself candidly stated (J.S. App. 22a) that it was merely *assuming* that anyone who supported MCFL's anti-abortion objectives would necessarily be willing to contribute to MCFL's efforts to elect sympathetic candidates (J.S. App. 22a-23a). However, there is no reasonable basis for assuming that every individual who opposes abortion necessarily uses this as the sole criterion for choosing which candidates to support. While many opponents of abortion may also support some of the candidates MCFL considers to be anti-abortion—either because of the candidates' position on abortion or for other unrelated reasons—there is no reason to assume that these individuals are any less interested than other Americans in being able to decide for themselves whether or not their money will be used to assist candidates for federal office at all, and if so,

which candidates it will be used to support. Many of MCFL's contributors may desire only to support the corporation's lobbying or educational activities, and not to participate in electoral politics at all. Others may, rather than passively trusting MCFL to make such decisions for them, prefer to make their electoral choices in other ways. For example, they might choose to follow a tradition of party loyalty or they might favor a candidate that does not oppose abortion because of that candidate's positions on a variety of other issues they consider important.

Most importantly, however, the court of appeals' assumption reflects its view on a question of policy, not law, and its view is directly contravened by the considered policy judgment of Congress in enacting the statute. Thus, during the debates on the 1947 amendments, Senator Taft was specifically asked what effect this amendment would have on a corporation organized for religious purposes which wanted to support a candidate on purely moral grounds. Senator Taft responded that so long as the organization was incorporated the statute would ensure that it "cannot take the church members' money and use it for the purpose of trying to elect a candidate or defeat a candidate, and they should not do so." 93 Cong. Rec. 6440 (1947). See also pp. 12-13 n.7, *supra*. Congress' determination that it is desirable to ensure that contributors to nonprofit corporations have the opportunity to make an informed choice in this important area clearly outweighs the court of appeals' view that this policy is unnecessary. See *Walters v. National Association of Radiation Survivors*, 105 S. Ct. at 3190.

Finally, a third compelling interest undermined by the court of appeals' decision is the public disclosure of the sources of federal campaign financing. The

Act as a whole reflects "Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Buckley v. Valeo*, 424 U.S. at 76. Section 441b was intended to serve this purpose by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund, which Congress has specifically included in the definition of political committee, 2 U.S.C. § 431(4)(B). Congress has thus indicated particular concern for disclosure by corporations and unions, for the primary effect of this special provision is to require a separate segregated fund to report both its expenditures and its sources of funding for disclosure on the public record under 2 U.S.C. § 434 even before its financial activity reaches the minimum level for other groups to become political committees under 2 U.S.C. § 431(4)(A).

This Court has found Congress' interest in public disclosure of the sources of campaign funding to be compelling even when applied to those making independent expenditures rather than contributions, concluding that "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley v. Valeo*, 424 U.S. at 81. If the court of appeals' decision is permitted to stand, the voting public will be denied the identities of the individuals who finance the political expenditures of corporations like MCFL, information which Congress has properly determined to be important to maintenance of an informed electorate. In fact, as discussed *supra*, pp. 26-27, the court of appeals indicated that

immunizing MCFL from this disclosure requirement was actually one of the objectives of its decision.

Moreover, it is not only the identity of *individual* contributors that would be withheld from the public under the court of appeals' decision. Although it appears that at the time of its expenditures in this case MCFL may have had a voluntary policy against accepting money from business corporations (J.A. 168-169), nonprofit, issue-oriented corporations covered by the lower court's decision can and often do receive funding from commercial corporations and/or unions.¹⁸ The court of appeals' decision could for the first time enable such corporations, bearing "seductive names that may tend to conceal the true identity of the source," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981), to convert into campaign expenditures unlimited amounts of money received from corporations or unions with substantial commercial interests in the causes they advocate, without ever disclosing to the public the true source of financing.¹⁹ Thus, despite the court of appeals' assumption that its decision only invalidates section 441b's requirements with respect to nonprofit, issue-oriented corporations, this decision's actual effect is to open the way to the use of such corpora-

¹⁸ For example, the National Right to Work Committee admitted that it received funding from commercial corporations. See *FEC v. National Right to Work Committee*, No. 81-1506, Joint Appendix at 19-22.

¹⁹ For example, an organization engaged in apparently "ideological" opposition to nuclear power might receive funding from a corporation engaged in coal mining that is interested in reducing its competition, or an organization engaged in apparently "ideological" advocacy of increased defense spending could be funded primarily by defense contractors.

tions as a vehicle through which *any* corporation or union would be able to transform unlimited amounts of its treasury funds into political expenditures, while keeping the actual source of the financing secret.

The Congressional scheme accomplishes this compelling objective of disclosing the true sources of campaign financing in the least intrusive manner. If corporations are permitted to make political expenditures from their general treasury funds, the only way in which Congress can ensure that the actual sources of these funds are disclosed to the public is to require corporations to file reports listing the sources of the corporations' general treasury funds.²⁰ By requiring the corporation to segregate its political contributions in a separate fund, segregated from its general corporate treasury, Congress has been able to satisfy its important interest in public disclosure of the sources of financing of political expenditures without requiring any disclosure of the names of the contributors to the corporation's other activities who choose not to support its electoral activities. Since this scheme has resulted in no discernible restriction on the amount or nature of corporate and union political expression during the almost 40 years that it has been in effect, it is entitled to substantial deference from this Court.

In sum, the application of section 441b in this case is fully supported by governmental interests which this Court has already recognized as compelling. The

²⁰ In fact, it is arguable that if MCFL's more than \$9,000 in expenditures are lawful "expenditures" under 2 U.S.C. § 431 (9) (B), as the court of appeals concluded, the definition of "political committee" currently contained in 2 U.S.C. § 431 (4) would require the corporation itself to register and report as a "political committee."

statute is narrowly drawn to serve these important purposes without unnecessary infringement upon corporate and union political activities. In these circumstances, there is no basis for finding section 441b to be unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals that 2 U.S.C. § 441b is unconstitutional as applied to uncoordinated expenditures of nonprofit corporations should be reversed.

Respectfully submitted,

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

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BOSTON, MASSACHUSETTS

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Questions Presented

1. Whether 2 U.S.C. § 441b prohibits the independent uncoordinated expenditures made by MCFL since §441b(b)(2) defines those expenditures which are prohibited and that section only includes payments made directly or indirectly to a candidate or campaign committee?

2. Whether §441b prohibits MCFL's expenditures since the MCFL newsletter did not contain any express advocacy?

3. Whether MCFL's newsletter is exempt from § 441b's prohibition because it is a newspaper or periodical publication within the meaning of the Federal Election Campaign Act?

4. Whether the phrases "in connection with," "for the purpose of influencing," and "newspaper" contained in § 441b are unconstitutionally vague?

5. Whether the Court of Appeals correctly held that § 441b is unconstitutional if applied to a nonprofit ideological corporation making uncoordinated expenditures to publish its views of political candidates?

6. Whether, if the exemption in § 431(f)(4)(A) applies only to the institutional media, § 441b abridges MCFL's right to equal protection of the laws because it impermissibly regulates the identity of the speaker?

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No. 85-701.

**In the
Supreme Court of the United States**

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief for the Appellee

Statement of the Case

This is an appeal by the Federal Election Commission ("FEC"), the plaintiff below, from the final judgment and decree entered on July 31, 1985, by the United States Court of Appeals for the First Circuit which found that 2 U.S.C. § 441b purported to prohibit corporations from making expenditures in connection with a federal election,¹ but was uncon-

¹The Act was amended in 1980, two years after the publication of the newsletters. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). These amendments changed the sections relevant to this action only slightly. Except where otherwise noted, citations in this brief refer to the statute as it existed in 1978. Attached as Appendix A is the text of the relevant sections of the Act as they existed in 1978. The FEC in its Jurisdictional Statement has provided a copy of the statute as it exists today.

stitutional as applied to Massachusetts Citizens for Life, Inc. ("MCFL"), a nonprofit ideological corporation making what the Court termed "independent uncoordinated expenditures to publish its views of political candidates." J.S. App. 24a.

MCFL was incorporated in January, 1973 as a nonprofit, grass roots, nonsectarian, nonpartisan, nonstock corporation under Massachusetts law. J.A. 83. At that time, it adopted the following "Statement of Purpose," J.A. 84:

In recognition of the fact that each human life is a continuum from conception to natural death, the objective of this organization is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity.

Since its incorporation, MCFL has engaged in a wide range of activities designed to foster respect for human life and to defend the right to life of all human beings, born and unborn. The organization has focused upon a number of issues to foster its goal, including euthanasia, experimentation on fetuses, and others. J.A. 85. It has engaged in many educational activities. J.A. 85-86. It has also participated in radio and television broadcasts on pro-life issues. *Id.* Between 1973 and 1978, MCFL sponsored a variety of legal and political activities and drafted and submitted various pieces of legislation on pro-life issues. J.A. 86-87. It has promoted the flow of information on such issues by distributing pro-life literature, including its newsletter. J.A. 86.

MCFL used various activities such as garage sales, cake sales, and dances to raise funds, in addition to dues from its members² and contributions, during the period 1973-1978. J.A. 85. All funds raised by MCFL in 1978 were from individ-

² The word "members" as used herein is not limited to "members" as that word is used in the Federal Election Campaign Act and defined by this Court in *FEC v. National Right to Work Committee (NRWC)*, 459 U.S. 197 (1982).

uals; none came from corporations. J.A. 85. In fact, MCFL does not accept contributions from business corporations. J.A. 85. In 1978, a portion of the contributions, dues, or funds raised by MCFL in 1978 were earmarked for specific political activities or for particular candidates. J.A. 85.

The primary avenue of communication among MCFL and its members is the MCFL newsletter. J.A. 87. From the outset MCFL and its members have recognized the necessity of building a strong base to achieve their goals, J.A. 90; the newsletter is the major vehicle in that effort.

The first edition of the newsletter was published in January, 1973, the month MCFL was incorporated. J.A. 88. Thereafter, through 1978 the newsletter was distributed fairly regularly, subject only to the availability of funds. J.A. 87-88, 97-98. Contributing members automatically receive the MCFL newsletter by mail. J.A. 88, 98. In addition, the MCFL newsletter is periodically mailed or distributed to all MCFL members. J.A. 88, 98.

MCFL paid all expenses for preparing, printing, and distributing the MCFL newsletter. These costs were met through the contributions, dues, and fund raising activities described above. J.A. 88, 98.

The MCFL newsletter typically is six to ten pages in length, is printed on newsprint paper and is devoted to current news concerning abortion and other pro-life issues. R. 159-325; 347-359.³ It contains information on past and upcoming MCFL activities and appeals for volunteers and contributions. J.A. 88-89, 98-99. It includes material on political, administrative, judicial and legislative developments. These reports are usually coupled with appeals urging MCFL members to contact decision makers and voice their support of pro-life positions. J.A. 88-89, 98-99. In periods before elections, MCFL regularly

³ For the convenience of the Court, 10 copies of a supplemental appendix containing copies of the 1978 Special Election Editions in Section A and copies of all MCFL newsletters in Section B have been lodged with the Clerk of Courts (hereinafter, "S.A., Section B"). One binder containing original newsletters has also been lodged with the Clerk.

printed Special Election Editions of the MCFL newspaper. J.A. 99. The first such edition was printed in September, 1974; two others were printed before September, 1978. J.A. 99.

From the beginning, these Special Election Editions included information on candidates' positions on certain issues. J.A. 99. The publication of the positions of the candidates was intended as an educational service, not as an endorsement of particular candidates. *Id.* See R. 347-354.⁴

The September, 1978 Special Election Edition disseminated information on the voting records and responses to questionnaires of candidates running in the September, 19, 1978 primary. The newsletter states that the "[MCFL] election survey is an educational service to help you cast an informed vote when you go to the polls. . . ." Special Election Edition at 1 in S.A., Section A; R. 347.

The Special Election Edition referred to 50 candidates for federal office and 442 candidates for state office. J.A. 100, 103-104, S.A., Section A. It accurately reported the position of every candidate on three central pro-life issues: 1) a "constitutional Human Life Amendment," 2) legislation to prohibit the use of tax funds for abortions, and 3) legislation to provide positive alternatives to abortion. The positions of the incumbents were determined by roll call votes, the positions of the nonincumbents by responses to MCFL questionnaires. J.A. 100, 103-104, 169. Pictures of 13 candidates were included. Most had responded positively on all three questions listed in the MCFL questionnaires. R. 306; S.A., Section A.

Shortly thereafter, MCFL printed and distributed a partial Special Election Edition of the MCFL newsletter for the sole

⁴MCFL is just one of a number of nonpartisan organizations, including Public Citizen, the United Church of Christ, the American Civil Liberties Union ("ACLU"), the United States Chamber of Commerce, and the John Birch Society which disseminate congressional voting records. See Certification to the United States Court of Appeals for the Second Circuit in *FEC v. Central Long Island Tax Reform Immediately Committee*, No. 78-C-1658 (E.D.N.Y. 1979), J.A. 31-54 and R. 35-111. For the convenience of the Court, MCFL has included copies of the various voting records attached as exhibits to that certification in Section C of the supplemental appendix.

purpose of correcting minor errors in the earlier full Edition's reporting of the voting records of Congressmen Tsongas, Studds and Drinan. J.A. 100, 104; S.A., Section A.⁵

No arrangements were made with any of the candidates listed in the Special Election Edition or the partial Special Election Edition, their campaign workers or political committees to coordinate or prearrange the preparation of the newsletter. J.A. 101, 105. Both editions specifically state that "[t]his special election edition does not represent an endorsement of any particular candidate." J.A. 101, 105.

The approximate cost of preparing, printing and distributing both editions was \$9,812. J.A. 101. This cost was entirely paid by MCFL from funds raised in the manner described above. J.A. 101. No candidate, political or campaign committee, and no corporation contributed any money towards the costs of preparing, printing or distributing the Special Election Editions. *Id.*

On March 4, 1982, the FEC instituted an action under the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), as amended, 2 U.S.C. §§ 431 *et seq.*, alleging that in publishing and distributing the newsletters MCFL violated 2 U.S.C. § 441b which prohibits corporations from making contributions or expenditures to a candidate in connection with a federal election. The FEC seeks a civil penalty of \$5,000.

The district court below, on cross-motions for summary judgment, entered judgment for MCFL. J.S. App. 25a-38a. It found that MCFL's publication of the Special Election Editions was not an expenditure under § 441b for several independent reasons, J.S. App. 30a-34a, and held, in the alternative, that if § 441b applied to MCFL's activities, it was an uncon-

⁵The FEC's assertion that copies of the Special Election Edition "apparently were distributed publicly," FEC Brief at 4, is based solely upon a letter to which MCFL objected in the court below because it contains hearsay and is not sworn to and so does not comply with Fed. R. Civ. P. 56(e). J.A. 175. The District Court never ruled on the objection because it granted summary judgment in MCFL's favor.

stitutional abridgement of MCFL's rights to freedom of speech, press and association, J.S. App. 38a. The Court of Appeals for the First Circuit upheld the district court's decision solely on the grounds that the statute was unconstitutional as applied to a nonprofit ideological corporation making indirect uncoordinated expenditures to express its views of candidates. J.S. App. 19a-24a.

The FEC timely filed its Notice of Appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a).

Summary of Argument

MCFL's expenditures did not violate § 441b. First, the actual language used in the definition of "expenditure" in § 441b(b)(2), the statutory section dealing with the corporate prohibition, proscribes only a "direct or indirect payment . . . to any candidate. . . ." This comports with the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), which recognizes full constitutional protection for independent expenditures, less protection for contributions, and treats expenditures actually coordinated with candidates as contributions for constitutional purposes. MCFL's expenditures were completely independent. The statute, which intrudes onto First Amendment terrain, should be construed narrowly, consistently with its own language and familiar constitutional principles (pp. 10-12).

Second, even if § 441b were interpreted as purporting to forbid truly independent expenditures, it should only be considered as forbidding only such communications as expressly advocate the election or defeat of clearly identified candidates. MCFL's newsletter, publishing truthful voting records of 492 candidates, is an issue-dominated publication, does not urge readers to "vote for" one candidate or "defeat" another, and should not be deemed to have violated any law (pp. 13-17).

Third, without regard to the previous statutory construction arguments, MCFL's newsletter is a "newspaper" or "periodical

publication" and therefore exempt from the corporate prohibition under § 431(f)(4)(A). Congress intended the exemption to be broadly construed so that § 441b might avoid constitutional infirmity. The newsletter's characteristics make it indistinguishable, constitutionally, from admittedly protected media publications, and the statutory exemption must be deemed to cover it (pp. 18-23).

If § 441b is interpreted as purporting to prohibit MCFL's newsletter it is, as the Court of Appeals held, unconstitutional. Independent expenditures are treated constitutionally as pure speech. Section 441b, in forbidding the expenditures at issue here, thus directly prohibits speech about vital public issues — speech at the core of First Amendment concerns. The fact that an ideological corporation like MCFL could set up a PAC which, in turn, might solicit contributions and make expenditures, does not mean that § 441b is not a prohibition and is merely a time, place, and manner restriction. It is a prohibition of, and thus an infringement upon, political speech (pp. 26-30).

Section 441b as applied to the newsletter published by MCFL, an ideological nonprofit corporation, would be a direct infringement upon the associational rights of MCFL's members (pp. 30-36).

If § 441b forbids MCFL from using its funds to publish its newsletter it infringes upon the freedom of the press guaranteed to MCFL and its members. That freedom extends to pamphlets, leaflets, and occasional publications as much as to daily newspapers (pp. 37-38).

Since § 441b impinges on first amendment rights it can only be upheld if it narrowly serves subordinating state interests. The primary purpose of § 441b, to avoid corruption, is not implicated by independent expenditures. The other possible purposes of the statute are not compelling and, in any event, are poorly served by prohibiting this ideological organization from spending its own funds to publish a voting record newsletter (pp. 38-46).

Section 441b, whose prohibitions depend upon undefined terms: "in connection with," "for the purpose of influencing"

and "newspaper", is unconstitutionally vague (n.19). If the "newspaper exemption," § 431(f)(4)(A), applies only to media corporations the prohibition as applied to MCFL's newsletter would deprive MCFL of equal protection of this law (pp. 46-48).

Argument

I. PUBLICATION AND DISTRIBUTION OF MCFL'S NEWSLETTER DID NOT VIOLATE 2 U.S.C. § 441b.⁶

A. Statutory Framework

The Federal Election Campaign Act, 2 U.S.C. §§ 431-455, comprehensively regulates all aspects of federal election campaign financing. The terms "contribution" and "expenditure" are central to the regulatory scheme. To place § 441b in context, MCFL will briefly address the definitions of those terms in 2 U.S.C. § 431(e) and (f), leaving aside § 441b for the moment.

The essential distinction is this: contributions refer to money or something else of value provided to candidates or political committees. A contribution is money that will be spent to influence the election. Expenditures refer to the spending itself, rather than the accumulation process. This spending can be done by the candidate or his authorized committee. It can also be done, if not coordinated in any fashion with the candidate, by a committee not authorized by the candidate, or by persons wholly apart from any committee. The latter two types of spending are often referred to as "independent expenditures."

⁶ MCFL recognizes the Court's duty "not [to] decide a constitutional question if there is some other ground upon which to dispose of the case." *Lowe v. Securities and Exchange Commission* (SEC), 105 S. Ct. 2557, 2563 (1985), quoting *Escambia County, Florida v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). See also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *FEC v. National Conservative Political Action Committee* (NCPAC), 105 S. Ct. 1459, 1466 (1985).

Contributions are thoroughly regulated, scrutinized and limited throughout the statute. See, e.g., 2 U.S.C. §§ 431(e)(1) to (4), 431(e)(5)(G)(i), 431(e)(5)(H), 432, 433, 434, 436(c), 437b, 439a, 441c, 441e, 441f, 441g (Appendix A).

Expenditures are much less regulated. Expenditures by political committees must be reported on approved forms at required intervals. 2 U.S.C. §§ 434(a) and (c), 436(c). Spending by noncandidates other than through political committees is subject to significantly less scrutiny. Only in the case of expenditures "expressly advocating the election or defeat of a clearly identified candidate" does the statute, once again leaving aside § 441b, take any notice. See, e.g., §§ 434(e) and 441d. Some disclosure is required. No dollar limitations are imposed, in keeping with *Buckley v. Valeo*.

The following pattern, then, emerges. Contributions are regulated and limited. Expenditures from ostensibly independent sources which are in reality coordinated with a candidate are deemed contributions. Expenditures by political committees are scrutinized but not limited. Independent expenditures by persons other than political committees are unlimited but are reported if they constitute express advocacy of the election or defeat of clearly identified candidates.

The FEC charge that MCFL violated the corporate spending prohibition by making a independent expenditure in distributing its newsletter must be analyzed against this background. It is not remarkable that the prohibition against corporate "contributions or expenditures" found in § 441b has its own definition which, in effect, defines "expenditure" as an indirect contribution. 2 U.S.C. § 441b(b)(2) contains this governing definition:

For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit,

or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election. . . . [emphasis added].

B. MCFL's Expenditures Do Not Meet the § 441b Definition of Expenditure.

MCFL's expenditures for its newsletter are not covered by the plain language of § 441b. The starting point in the construction of a statute is the language itself. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). The language of § 441b makes it clear that what it prohibits is a direct or indirect payment to any candidate or committee. Under *Buckley*, 424 U.S. at 47, such indirect contributions may be circumscribed.

The district court properly construed the § 441b definitional terms as exclusive although the section uses "shall include," rather than "shall mean." The general definition section adopts the § 441b definition by stating that an expenditure does not include a payment by a corporation which does not constitute an expenditure under § 441b. 2 U.S.C. § 431(f)(4)(H). There would be no reason for any definition in § 441b if the terms "contribution" and "expenditure" in that section were to be governed by § 431.

The legislative history supports the district court's construction of § 441b. The 1907 Tillman Act, 34 Stat. 864, made it unlawful for any corporation to make a "money contribution" in connection with a federal election. The Labor Management Relations Act of 1947 (the Taft-Hartley Act), 61 Stat. 136 (1947), extended the prohibition to "expenditures" in connection with an election.⁷ The purpose of that extension was to pre-

⁷ Between 1907 and 1947, Congress made a number of other changes in the statute. The Federal Corrupt Practices Act, 1925, ch. 368, 43 Stat. 1073 (1925) (former 18 U.S.C. § 610), replaced the phrase "money contribution" with

vent expenditures that were actually indirect contributions. *United States v. CIO*, 335 U.S. 106, 115 (1948). It was added "to eradicate the doubt that had been raised as to the reach of [the prohibition on] 'contribution,' not to extend greatly the coverage of the section." *Id.* at 122.⁸

In 1972, consistent with this Court's recognition in *CIO* that the expenditure prohibition was designed to catch indirect contributions, the clarifying proviso was added to § 441b: "[a]s used in this section, the term 'contribution or expenditure' shall include any direct or indirect payment . . . to any candidate. . . ."

The Court of Appeals, in holding that § 441b applied to the independent expenditures at issue here, relied solely on the fact that it could find no affirmative statement in the legislative history that Congress intended to narrow the section in 1972 when it added the definition of "expenditure" (despite the statement by Representative Hansen, who sponsored the bill, that "[t]he net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 . . . and to codify the case law." 117 Cong. Rec. H43379). The search for such an affirmative statement ignores the fact that the statute already included a broad definition of expenditure in § 431, making the

"contribution" and added a definition of "contribution." "Expenditure" also was defined, but the corporate prohibition did not extend to that term.

The War Labor Disputes Act of 1943, Pub. L. No. 78-89, 57 Stat. 167 (1943), extended for the duration of the war, the prohibitions of the Corrupt Practices Act to labor organizations.

Section 304 of the Taft-Hartley Act broadened the corporate prohibition to include "expenditures." It did not provide a separate definition of "contribution or expenditure" but, since the Act amended what had been the original Tillman Act, the definition was that added in 1925: "a payment . . . of money, or anything of value, and includes a contract . . . to make an expenditure."

⁸ The FEC has cited the statement in *Pipefitters v. United States* that Senator Taft's explanation of the scope of the provision is "controlling" to support its expansive interpretation of the section. In fact, the Court cited his testimony on the limited reach of the section because of the danger that the statute would impinge on First Amendment freedoms. "We conclude, accordingly, that his view of the limited reach of § 610, entitled in any event to great weight, is in this instance controlling." *Pipefitters v. United States*, 407 U.S. 385, 409 (1972) (emphasis added).

addition of the definition section in § 441b(b)(2), under the Court of Appeals' interpretation, total surplusage. "This construction, therefore, offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). Congress should not be presumed to have acted without purpose. In view of the obvious constitutional difficulties raised by a more expansive application, the narrow construction adopted by the district court avoids the grave constitutional issues which inhere in any effort to proscribe truly independent expenditures. *Cf. Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J. concurring).

In construing § 441b, the descending order of intrusiveness which accompanies the use of the terms "contribution" and "expenditure" should be kept in mind. Where the purpose is prohibition — the ultimate in regulation — it stands to reason that only those instances of spending which are indistinguishable from a "contribution" should be deemed within the congressional intent. All other prohibitions in the Act relate to direct or indirect contributions, not to independent expenditures. *See, e.g., §§ 441c, 441e, 441f and 15 U.S.C. § 791(h).*

Thus the statute proscribes contributions to a candidate and those expenditures which are tantamount to contributions because they are authorized by, or coordinated with, a candidate or committee. *Cf. United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union, Inc. (ACLU) v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975). The district court found that MCFL did not violate the statute as so construed. The Special Election Editions targeted by the FEC were neither authorized by, nor coordinated with, any candidate. J.A. 344-345; 363-364. In the ordinary course of its business MCFL independently prepared, printed and distributed its newsletters. The fact that MCFL's expenditures are not within the § 441b prohibition is an independent nonconstitutional basis on which the judgment of the Court of Appeals may be affirmed.

C. Expenditures by MCFL to Publish Its Newsletter Are Not Forbidden Because the Newsletter Contains No "Express Advocacy."

Whatever definition of expenditure is applied, MCFL's spending is not covered because the newsletters did not contain express advocacy.⁹ The legislative history of § 441b, prior interpretations of that and other sections of the Act, and the Constitution all preclude application of the statute to communications that do not expressly and primarily advocate the election or defeat of a clearly identified candidate by using such specific exhortations as "vote for" or "defeat" that candidate. Neither of the Special Election Editions satisfies these standards.

As pointed out earlier, Congress extended the corporate spending prohibition from "contributions" to "expenditures" only to prevent circumvention of the statute by the argument that "contribution" was confined to direct gifts or payments. If the sweep of § 441b is construed as going beyond indirect contributions, it should be limited to the kind of active electioneering described above. *See generally, Note, Corporate and Labor Union Activity in Federal Elections: "Active Electioneering" As a Constitutional Standard*, 49 Geo. Wash. L. Rev. 761 (1981).

Senator Taft repeatedly assured his colleagues that the amendment proscribed only active electioneering. For example, he stated:

If a labor organization is using the funds provided by its members through payment of union dues to put speakers on the radio for Mr. X against Mr. Y, that should be a violation of the law.

* * *

[I]n each case the question is whether or not a union or a corporation is making a contribution or expenditure of funds to elect A as against B.

⁹The Court of Appeals did not decide whether the express advocacy standard would apply since it found that, in any event, the MCFL newsletter constituted express advocacy. *See p. 16 infra.*

(Emphasis added.) 93 Cong. Rec. 6440 (1947). He maintained that the prohibition on expenditures would not interfere with a union or corporation's normal activities, even if they were related to an election. *See* 93 Cong. Rec. 6437 (1947). This Court has resorted twice to this legislative history to bolster narrow interpretations of the statute and thereby avoid constitutional issues. *United States v. CIO*, 335 U.S. at 122-124; *United States v. UAW*, 352 U.S. 567 (1957). In *United States v. UAW*, the Court reversed the dismissal of an indictment charging that the defendant labor organization had made illegal expenditures by sponsoring television broadcasts actually endorsing the election of certain candidates but declined to decide the case on constitutional grounds, remanding it instead for further factual development. The Court stated that the district court should consider whether the broadcast "constitute[d] *active* electioneering or simply state[d] the record of particular candidates on economic issues." *Id.* at 592 (emphasis added).

When Congress enacted the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), the sponsor emphasized that his amendment was intended simply to codify prior judicial interpretations and to "carry out the basic intent of [the Act], which is to prohibit the use of union or corporate funds *for active electioneering* directed at the general public on behalf of a candidate in a federal election." 117 Cong. Rec. 43380 (1971) (emphasis added). Similarly, the House Committee report states:

Of course, expenditures for the communication of views *not advocating the election or defeat of a candidate* would be counted neither as independent expenditures nor as direct contributions to any candidate. . . . The Committee is convinced that this approach makes possible the adequate presentation of candidate-related views by independent groups. . . .

(emphasis added.) H.R. Rep. No. 1239, 93d Cong., 2d Sess. (1974). Blithely ignoring this legislative history, the FEC in-

terprets § 441b as barring expenditures for the purpose of presenting "candidate related views by independent groups," such as MCFL. J.A. 64-65.

In *Buckley*, 424 U.S. at 44, this Court narrowly construed the term "expenditure" in §§ 431(f)(4)(C) and 434(e) as requiring express advocacy in order to save *disclosure* provisions having far less impact than § 441b upon the ability to communicate candidate-related views. Congress cannot constitutionally preclude corporate spending to communicate the corporation's views on public issues. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Therefore, in order to avoid serious constitutional issues, the statute must be construed as prohibiting only expenditures for communications which contain express advocacy of the election or defeat of a clearly identified candidate.

There was no express advocacy here. Like all MCFL newsletters, the Special Election Editions were published for an educational purpose: to inform readers about the records and positions of all candidates on critical pro-life issues. Mere dissemination of voting records is not express advocacy, as the FEC has belatedly conceded. *See* 11 C.F.R. § 114.4(b)(4) and (5) (1985).¹⁰ In the words of Thomas Jefferson, the MCFL

¹⁰The FEC's interpretation of § 441b has been woefully inconsistent, and this case is a hangover from earlier views. In an Advisory Opinion to the Chamber of Commerce of the United States, the FEC stated that distribution of nonpartisan voting records to nonmembers would violate § 441b because the expenditure would be "in connection with" a federal election. AO 1978-18, 1 Fed. Elec. Camp. Fin. Guide, ¶ 5305. Dissenting member Aikens described the voting records as having no reference to any election, or to any Congressman's status as a candidate, and no advocacy of election or defeat. She pointed out the "enormous constitutional questions" raised by the majority opinion. Nonpartisan dissemination of voting records was still assumed by the FEC to be prohibited in 1979 when it found "reasonable cause" to believe MCFL had violated the statute, and in 1980 when it found "probable cause." J.S. App. 46a, *see* FEC probable cause brief, R. 334-336. The FEC still assumed nonpartisan distributions would suffice in 1982 when it answered interrogatory no. 11. J.A. 64-65. Thus the FEC believed that while "express advocacy" may have existed here it was not a necessary element of any violation. In regulations promulgated in 1983, the FEC flip-flopped and now allows corporations to prepare and distribute to the public voting records and voting guides. *See* 11 C.F.R. § 114.4(b)(4) and (5) (1985). What this

editions advocated "good government". They urged readers to vote and to vote pro-life. They referred to certain primaries as offering the reader "a clear choice on the issue of abortions." As the FEC points out, not all voters — even voters in favor of pro-life issues — choose to vote on the basis of a candidate's position on abortion. FEC Brief at 32. Whether voters should consider a candidate's stance on abortion — as opposed to environment, weapons build-up, or balanced budget — as central in deciding how to vote is itself a public issue and one on which MCFL was taking a stand. It was advocating abortion as the number one issue. The statement "vote pro-life" is a statement on an issue — what to look at in deciding how to vote — and not advocacy of the election or defeat of any candidate.

The newsletters were, in short, issue-oriented. Nowhere did they exhort the reader to "vote for" or "defeat" any of the candidates whose positions were recorded. To the contrary, both editions clearly stated: "This special election edition does not represent an endorsement of any particular candidate." Further, in many of the races, the positions of opposing candidates on the abortion issue were indistinguishable. The substance of the communications resembles the "issue advocacy" protected in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), rather than the "candidate advocacy" permitted to be regulated in limited ways by *Buckley*, 424 U.S. at 79-82.

The Court of Appeals' finding that the newsletters constituted express advocacy focused on the statement "that your vote in the primary will make the critical difference in electing pro-life candidates" and the fact that pictures of certain candidates were displayed. The statement certainly does not comport

change in position shows (since there was no change in statutory language) is that even the FEC, the agency with authority to interpret the Act, is not sure what is covered by its language. This underscores the fact that the statute is unconstitutionally vague. See n.19, *infra*.

with the *Buckley* definition of express advocacy. It merely bespeaks the importance of the abortion issue.

The pictures by themselves cannot constitute express advocacy. *Buckley* requires "express words of advocacy of election or defeat." *Buckley*, 424 U.S. at 44 n.52 (emphasis added).¹¹ At most, the pictures were relevant to whether there was a "clearly identified candidate." See 11 C.F.R. § 100.17. This is not the first time that the FEC has attempted to merge the two requirements. See *FEC v. American Federation of State, County and Municipal Employees (AFSCME)*, 471 F. Supp. 315 (D.D.C. 1979). Printing the pictures of candidates who answered "yes" to questions posed by MCFL can be viewed as a way of projecting candidates' responses. Since the FEC finally concedes that voting records and responses to questions can be printed, it should not be allowed to protest the method chosen to communicate that information. In any event, a communication "primarily devoted to subjects other than the express advocacy of the election or defeat of a candidate" cannot be proscribed. Cf. *FEC v. AFSCME*, 471 F. Supp. at 316. The MCFL Special Election Editions were primarily devoted to pro-life issues. They were not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Moreover, the Special Election Editions were not disseminated for the "express purpose" of encouraging election or defeat of a particular candidate. *FEC v. Central Long Island Tax Reform, Etc.*, 616 F.2d 45, 53 (2d Cir. 1980). The absence of "express advocacy" is an additional independent non-constitutional basis upon which to affirm the judgment of the Court of Appeals.

¹¹ Indeed, often the pictures of two opposing candidates were printed. For instance, the pictures of the Democratic and Republican candidates for United States Senate, Howard Phillips (D) and Avi Nelson (R), both were displayed. Additionally, the Special Election Editions contained the picture of Congressman Thomas O'Neill, the Speaker of the House, even though as Speaker he had no vote and did not return a completed questionnaire. R. 306; S.A., Section A.

D. *The MCFL Newsletter is Exempt Under § 431(f)(4)(A).*

The newsletter is also exempted from the definition of "expenditure" by § 431(f)(4)(A) which protects: "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication. . . ." The FEC suggests that this exemption is a "news media" or "communications media" exemption, FEC Brief at 7 and 18. However, properly construed, it must refer to the form of communication rather than the communicator because "in the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. 765, 784-785 (1978).¹²

The MCFL newsletters are printed on newsprint, in sheet form, without a permanent binding; their contents are customarily the product of a staff rather than a single author; they comment on a wide range of current pro-life developments; and they are distributed relatively regularly. J.A. 149, 158-325, 340. See *Pacific Gas & Elec. v. P.U.C. of California*, 106 S. Ct. 903, 907-908 (1986), where this Court recently described a public utility's billing insert as "[i]n appearance no different from a small newspaper, *Progress*' contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes," and concluded that it "receives the full protection of the First Amendment."

¹² A majority of this Court recently affirmed that the First Amendment gives no more protection to the institutional press than it does to others exercising their freedom of speech. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) ("We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection." (per Brennan, J., Marshall, Blackmun & Stevens, J., dissenting)), *id.* at 2958; ("[I] agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech" . . . "And this court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten" (per White, J.)), *id.* at 2953, 2953 n.4.

The FEC's argument that even if the newsletter is a newspaper or periodical publication, the Special Election Editions are not, is meritless. The Special Election Editions, though devoted primarily to the publication of voting records, are closely linked to other editions of the newsletter, sharing as they do the focus on pro-life issues. To attempt to distinguish the Special Election Editions from the regular newsletters, as did the Court of Appeals, on the basis of number of copies printed, and the type of masthead is nonsensical. Many daily newspapers have a Sunday edition which has a different editorial staff, and a significantly larger circulation. That edition does not lose its status as a newspaper simply because of those differences (nor would a "special election edition" or an election "extra" of a daily newspaper lose its newspaper status where numerous extra copies were printed in anticipation of strong public interest in the subject). Indeed, the point should not be lost that the MCFL newsletters (including the Special Election Editions) were not slick, professional productions. Virtually every edition varied in some way: some were dated, others were not; several did not have volume numbers; some were typed, while others were printed. These differences were apparently due to the vagaries of funding or the identity of the people preparing the particular edition.¹³

Whether or not MCFL's newsletters fall within the exemption cannot turn on superficial notions of form.¹⁴ To compel

¹³ The Court of Appeals makes the assumption that there was a newsletter "staff" and gives as one reason why the Special Election Editions were not exempt as newspapers the fact that they were not prepared by that staff. J.S. App. 18a. There was testimony that the editor of the 1978 Special Election Edition had only worked on that one newsletter, but the fact that only one issue was brought out while she was editor seems irrelevant. J.A. 143. While the organization itself did have paid staff members, see J.A. 88, there is nothing in the record to indicate that there was a paid newsletter staff as such. The record is clear that MCFL considered that it published a newsletter that came out with regular and special editions from time to time, see J.A. 87-89, 97-105, and that the newsletter was prepared entirely by MCFL members. J.A. 88.

¹⁴ The FEC has not adopted regulations defining the terms used in the exemption, but has suggested reference to its regulations for staging of political debates, 11 C.F.R. § 110.13, which define *bona fide* newspapers and periodical

MCFL to adopt a particular form or style of publication or to publish on a schedule agreeable to the FEC but not responsive to MCFL's needs would be to allow the government to impose "time, place or manner regulations" based on the content of speech. Further, such regulation would impose burdens on MCFL involving "more cost and less autonomy" than its chosen form, manner and timing of publication. *Linmark Assoc. v. Willingboro*, 431 U.S. 85, 93 (1977). MCFL would be impermissibly compelled, under the FEC's construction of the exemption, to expend money solely to alter the form and style of the newsletters or to publish the newsletter when it had nothing to communicate. Cf. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Elec. v. P.U.C. of California*, 106 S. Ct. 903, 909 (1986). For constitutional reasons, the exemption must be broadly construed to include MCFL's Special Election Edition newsletter.

Legislative history, though sparse, clearly evinces a congressional intent to give the terms "newspaper" or "periodical publication" the widest possible definition. Less than a year after the Taft-Hartley Act first extended the prohibition to corporate "expenditures," in a case involving a labor publication, *The CIO News*, this Court narrowly construed the provision. *United States v. CIO*, 335 U.S. at 121-124. The Court noted, "[i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication." *Id.* at 123. The Court's concern was not limited to internal corporate and union communications. The Court stated that if the prohibition

were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members,

publications as those which appear at regular intervals and derive their revenues from subscriptions or advertising. Those regulations are inconsistent with the purpose and legislative history of the exemption, and indeed would exclude the progenitors of most of today's dailies.

stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Id. at 121 (emphasis added).

Some 26 years after *United States v. CIO*, Congress enacted the exemption foreshadowed in the *CIO* opinion. FECA Amendments of 1974, Pub. L. No. 93-433, Title I § 102(d), Title II § 201(a)(5), 86 Stat. 3 (1974). The House of Representatives Report stated that the exemption of "newspapers, magazines and other periodical publications" from the definition of "expenditure"

make[s] it plain that it is *not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association.*

(Emphasis added.) H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974).¹⁵ Unquestionably, depriving MCFL of the benefit of § 431(f)(4)(A) would burden its First Amendment freedom of the press and of association. See Section II *infra*.¹⁶

Further, one member of the Committee specifically observed that "[t]his provision . . . may exempt some special interest

¹⁵ The earliest newspapers were more akin to the MCFL newsletter than is the "bona fide newspaper" sanctioned by the FEC. See A. Smith, *The Newspaper, An International History* (London 1979). They were published "not periodically but as occasion demanded" (at 7) and political news dominated (at 9).

¹⁶ That Congress intended the exemption to be given a broad application is evidenced by the simultaneous enactment of a disclosure provision containing a much more limited newspaper exemption in 2 U.S.C. § 437a which has since been repealed. The FEC has tried to interpret § 431(f)(4)(A) as if it contained the repealed § 437a limitation, invalidated as unconstitutional by the Circuit Court (but not appealed to this Court) in *Buckley v. Valeo*, 519 F.2d 821, 869-878 (D.C. Cir. 1975) (en banc) (per curiam).

publications which may be extremely useful and effective to certain candidates during a campaign." *Id.* Thus, the fact that the MCFL Newsletter may have been useful to certain candidates by publishing those candidates' positions on an issue of vital concern to many voters does not change the fact that such newsletters were intended by Congress to be exempt.

Sensitivity to First Amendment freedoms has led this Court to construe broadly a narrower exemption than that found in this case. In *Lowe v. SEC*, 105 S. Ct. 2557 (1985), the Court held that the exemption in the Investment Advisors Act of 1940 for "the publisher of any *bona fide* newspaper, news magazine, or business or financial publication of general and regular circulation" applied to a newsletter advertised as a semi-monthly publication (although only eight issues were published in 15 months) with subscriptions ranging from 3,000 to 19,000.¹⁷ The opinion stressed that "[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Id.* at 2571 n.50, quoting *Regan v. Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 3292 (1984) (Stevens, J., concurring in part, and dissenting in part). Since the exclusion in *Lowe* was deemed to contain "extremely broad language," the exemption at issue here, which does not require that the newspaper be "*bona fide*" or "of general and regular circulation," must be construed in the broadest sense.¹⁸

¹⁷ To avoid constitutional questions, the only courts to have addressed the newspaper exemption have viewed it as granting broad protection to publications. See *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981); *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). Even the FEC has acknowledged "the overriding protection of the First Amendment in this area." MUR (matter under review) 296 (76), quoted in *FEC v. Phillips Pub., Inc.*, 517 F. Supp. at 1312.

¹⁸ See also *United States v. Kelly*, 328 F.2d 227, 236 (6th Cir. 1964) (daily horse racing finger sheet constituted "newspaper or similar publication" exempt from prohibition against interstate transportation of wagering paraphernalia); *Friedman's Exp. Inc. v. Mirror Transp. Co.*, 169 F.2d 504 (3d Cir. 1948)

The district court correctly held that MCFL did not violate 2 U.S.C. § 441b because the publication and distribution of its newsletters was exempted by § 431(f)(4)(A).¹⁹

II. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 441b IS UNCONSTITUTIONAL AS APPLIED TO A NONPROFIT IDEOLOGICAL CORPORATION MAKING INDEPENDENT EXPENDITURES.

Although the Act has been the subject of repeated constitutional attack, both this Court and lower federal courts have strained to construe it so as not to apply to the activities which the government sought to proscribe, regulate or chill.²⁰ If MCFL's expenditures are prohibited by § 441b, that section, as both the district court and Court of Appeals held, is unconstitutional.

(comics section of Sunday newspaper was by itself "newspaper" exempt from certification requirements of Interstate Commerce Act); *In re Sterling Cleaners & Dyers, Inc.*, 81 F.2d 596, 597 (7th Cir. 1936) (daily publication giving news and notices of proceedings in Chicago courts, held "newspaper" under Bankruptcy Act); *King County v. Superior Court*, 199 Wash. 591, 92 P.2d 694 (1939) (weekly publication principally espousing views of political organization is a "newspaper"); *In re Bibb Co.*, 117 Minn. 214, 135 N.W. 385 (1912) (daily finance and commerce publication is a newspaper).

¹⁹ If § 441b applies to MCFL's activities, it is unconstitutionally vague under the Fifth Amendment. The phrases "in connection with," "for the purpose of influencing," "newspaper" and "periodical publication" do not give sufficient warning as to precisely what activities are prohibited. See *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983). Even the FEC does not have a definition for the term "newspaper." A statute which has such potential for chilling speech must be drawn with precision. "[I]t is difficult to conceive a statute affecting [First Amendment] rights more lacking in precision, more broad in the scope and uncertainty of its reach." *United States v. CIO*, 335 U.S. at 151 (Rutledge, J., concurring).

²⁰ Section 441b has been before this Court on four occasions. *Cort v. Ash*, 422 U.S. 66 (1975); *Pipefitters v. United States*, 407 U.S. 385 (1972); *United States v. UAW*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948). Five Supreme Court Justices (Rutledge, Douglas, Murphy, Warren and Black) have opined at different times that the section is unconstitutional.

A review of this Court's election law cases beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), establishes certain fundamental propositions and provides a framework for analyzing § 441b. *Buckley* was a challenge to certain of the contribution and expenditure limits contained in the Federal Election Campaign Act of 1971, as amended in 1974. The Court held that only the governmental interest in preventing corruption or the appearance of corruption was significant enough to justify restrictions upon fundamental First Amendment guarantees of freedom of speech and association, *id.* at 26, and that independent expenditures, however large and effective, enjoy a highly protected status because they have at most a tenuous potential for causing corruption. *Id.* at 22-23. Therefore, no limit on independent expenditures was allowed.

Two years after *Buckley*, the Court struck down a state criminal statute which prevented banks and business corporations from spending money to publicize their views in opposition to a referendum issue. *Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court held that the corporate status of the speaker does not deprive speech of its First Amendment protection. Even several of the dissenting justices indicated that if the corporation is the nonprofit outgrowth of individuals joining together to advocate common views, the corporate status of the speaker, far from depriving speech of its protected status, if anything would increase the protection because the corporation enhances and secures the rights of its individual constituents. *Id.* at 805 (White, J., dissenting, Brennan, J. and Marshall, J., joining).

In *FEC v. National Right To Work Committee (NRWC)*, 459 U.S. 197 (1982), the Court held that a provision of FECA related to the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. NRWC had challenged the restriction imposed on nonstock corporations soliciting contributions for a segregated fund set up for the purpose of contributing to candidates. The limitation on solicitation was upheld because of the constitutional validity of regulation of corporate contributions to candidates for pub-

lic office. *Id.* at 208-210. Neither solicitation nor contributions is at issue here.

Last year, in *FEC v. NCPAC*, 105 S. Ct. 1459 (1985), limits on independent expenditures by an incorporated political committee were held to violate the First Amendment. The Court reaffirmed the conclusion in *Buckley* that independent expenditures have no potential for corruption since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 1469, quoting *Buckley*, 424 U.S. at 47.

These decisions establish certain fundamental propositions: (i) the governmental interest in preventing corruption or the appearance of corruption may sustain contribution or expenditure regulations, both of which restrict fundamental First Amendment guarantees of freedom of speech and association, (ii) independent expenditures, however large and effective, are highly protected because they have no or, at most, a tenuous potential for corruption, (iii) the corporate status of the speaker does not deprive speech of its protection under the First Amendment and, (iv) where the corporation is the nonprofit outgrowth of individuals having joined together to advocate their common views, the corporate status of the speaker increases the degree of protection to be accorded.

Despite the backdrop of these decisions, the FEC maintains that § 441b has no impact upon the constitutional rights of MCFL. It accomplishes this sleight of hand by viewing § 441b as a mere regulation of the method of financing political speech which it claims serves a variety of compelling interests, disregarding the fact that these same interests have been rejected by this Court or are not the least restrictive way to accomplish the same objectives. The principles underlying the election law cases compel affirmance of the First Circuit's opinion that § 441b is unconstitutional as applied to MCFL.²¹

²¹ Since *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a number of commentators have concluded that to the extent that § 441b is con-

A. Section 441b Impinges on Freedom of Expression.

The First Amendment has its "fullest and most urgent application" to the conduct of campaigns for political office including, of course, discussions of candidates and all matters relating to the political process. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971). See, e.g., *Brown v. Hartlage*, 456 U.S. 45 (1982); *Bellotti*, 435 U.S. at 776; *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). The "free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy — the political campaign." *Brown v. Hartlage*, 456 U.S. at 53. The protection, moreover, extends to critical discussions of public officials and to vigorous advocacy of their election or defeat. See *Buckley*, 424 U.S. at 48, 52-53; *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Expenditures for protected communications are safeguarded no less than pure speech, *Buckley*, 424 U.S. at 16-17, even where the speaker (the spender) is a corporation. *Bellotti*, 435 U.S. at 784; *Pacific Gas & Elec. v. P.U.C. of California*, 106 S. Ct. 903 (1986). Thus, a restriction on expenditures for

strued to prohibit independent expenditures by any corporation, it is unconstitutional. See, e.g., Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373 (1981); Nicholson, *The Constitutionality of Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 Cornell L. Rev. 945 (1980); Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti*, 28 Am. U.L. Rev. 149 (1979); *First National Bank of Boston v. Bellotti — Money Talks: Constitutional Protection of Corporate Speech*, 8 Cap. U.L. Rev. 575 (1979); Note, *Corporate Free Speech: First National Bank of Boston v. Bellotti*, 20 B.C.L. Rev. 1003 (1979); *First National Bank v. Bellotti*; *The Constitutionality of Government Restrictions on Political Spending by Corporations*, 16 Hous. L. Rev. 195, 208 (1978).

Moreover, in Canada, federal legislation which prohibited all persons, including corporations, from incurring "express advocacy" expenditures during an election was struck down by the court as violative of the Canadian Charter of Rights and Freedoms (the "Charter"). *National Citizen's Coalition Nationale des Citoyens Inc. v. Attorney General of Canada*, [1984] 5 WWR 436 (Alta. Q.B.). In its decision the court drew no distinction between corporate speech and individual speech and essentially followed *Buckley*.

the publication and distribution of MCFL's newsletter intrudes on a core area of expression of MCFL and its members.²²

Because § 441b is aimed at a type of speech — political speech — there is no way to pigeon hole it as a time, place and manner regulation. *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977). It is an impermissible content-based regulation since, as the Court of Appeals noted, "it is the political content which runs afoul of the statute (emphasis in original)." J.S. App. 20a. It does not save the statute that it does not discriminate on the basis of the speakers' views, but outlaws an entire topic. As this Court stated in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980):

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

(Citations omitted.) See also *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 3119-3120 (1984).

The FEC argues that § 441b does not restrict political speech because MCFL could have administered a separate segregated fund (a "PAC"), and that PAC could have published and distributed the newsletter. FEC Brief at 21-22. This argument at best seems to treat the Act as a time, place and manner restriction, which is thoroughly inappropriate, as MCFL has demonstrated above. Compare *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (Congress constitutionally may choose not to subsidize a charitable organization's lobbying). More basically, it is inconsistent with the major thrust of the

²² There is no doubt that an association, like MCFL, though a corporation, may assert the constitutional rights of its members. See, e.g., *NAACP v. Button*, 371 U.S. 415, 428 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Cf. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

FEC's position: that corporations must be forbidden to use their general funds for electoral purposes because of the "widespread abuses" this would allow, which abuses would present "imminent danger of corruption" and result "in a decline of public confidence in the integrity of elected officials. . ." FEC Brief at 30. The FEC cannot have it both ways. Section 441b cannot be a rather innocuous rearrangement of the manner in which the speaker is allowed to proclaim its message and at the same time be the rugged and absolutely necessary dam holding back the flood tide of tainted money which would drown the electoral process in corruption. There should be no mistake here: § 441b, if interpreted as the FEC suggests, is a prohibition of corporate speech, not a channeling of corporate spending. Prohibitions infringe speech. This prohibition must rise or fall dependent on whether it meets the tests applicable to serious, content-regulating infringements.

MCFL is an active vibrant organization, with a highly focused point of view, which gathers funds for its treasury from various activities. If it raises \$50 from selling roses, \$200 from a dinner dance, \$75 from a garage sale and \$100 from unsolicited donations from like-minded people, there is no doubt that forbidding any of those monies to be used to defray printing costs of an election newsletter, and forcing the organization to set up a bothersome PAC for this kind of funding, is a serious infringement, and not merely a benign, formal shaping of expression.

In any event, as applied to MCFL, the right to establish a PAC was meaningless. MCFL did not have "members" as that term is used in the Act. Thus, it would have been permitted to set up a separate segregated fund, but would have been prohibited from soliciting contributions to the fund except from the directors and their families.²³ See *FEC v. NRWC*, 459 U.S.

²³ To paraphrase the Court's comment in *Buckley*, 424 U.S. at 19 n.18, being free to engage in unlimited political expression while subject to the FEC's restrictions is like being free to drive an automobile as far and as often as one desires on a quarter of a tank of gas.

at 205-206. The Court in *Buckley* stated:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. *The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs.*

(Emphasis added.) *Buckley*, 424 U.S. at 19. There can be no question that the FEC's proffered alternative would restrict the quantity of MCFL's speech.

Moreover, requiring an ideological corporation to use a PAC to carry out its political advocacy presents particular problems which may chill the corporation's exercise of its First Amendment rights even if § 441b could be viewed as a time, place and manner regulation. The Act imposes burdensome administrative and recordkeeping requirements on PACs, see 11 C.F.R. Part 114, which an ideological corporation with limited funds may find too difficult or expensive to undertake and so, instead, may choose not to bother.²⁴

Additionally, FECA requires PACs to disclose the names of contributors. 2 U.S.C. § 434(b)(3). As the Court of Appeals found, J.S. App. 21a, in an area of sensitive First Amendment rights, mere disclosure may be sufficient to deter. *FEC v. Hall-Tyner*, 678 F.2d 416, 420 (2d Cir. 1982), cert. denied, 459 U.S. 1145 (1983). See also *Brown v. Socialist Workers'*

²⁴ The FEC makes some point of the fact that MCFL eventually established a PAC. MCFL objected below to any reference to this under Fed. R. Evid. 407. The district court, entering judgment for defendant, did not rule on this objection, which MCFL continues to maintain. In any event, the PAC was created only after the *in terrorem* effect of enforcement proceedings by the FEC and was possible only after the Articles of Organization and bylaws had been amended to create membership categories. The organization creating the PAC was a different type of corporation than the one sued by the FEC.

'74 Campaign Comm., 459 U.S. 87 (1982). A majority of the population disagrees with MCFL. J.S. App. 31a. Contributors might well be deterred if their names would be disclosed. As the Court in *Buckley* found, requiring public disclosure of the name of a speaker as the price for speaking is permissible only when the government can show that "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. As discussed in Section IID *infra*, this requirement is not met.

In short: a prohibition on spending from the corporate treasury is a prohibition of speech. Even if § 441b were deemed a limitation and not an outright prohibition, such a limitation would significantly affect freedom of speech.

B. Section 441b Impinges on the Freedom of Association of MCFL and its Members.

1. History of Associations

Associations are as old as the concept of ordered liberty and are basic to our democratic society. As Alexis DeTocqueville observed over a century ago, this is because:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

1 A. DeTocqueville, *Democracy in America* 196 (P. Bradley ed. 1945).

The "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control v.*

Berkeley, 454 U.S. 290, 294 (1981). For "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982). Indeed, though America is famed for being individualistic, its history is truly a biography of a nation of joiners. See Schlesinger, *Biography of a Nation of Joiners*, 50 Am. Hist. Rev. 1 (1944). The vast and intricate mosaic of voluntary organizations occupies a crucial place in American history. Factional debate spawned by such organizations is integral to the political process. See, e.g., *United States v. CIO*, 335 U.S. at 143-144 (Rutledge, J., concurring):

The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it. Moreover, . . . that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience.

In constantly demonstrating the underlying unity that warrants diversity, these associations "have served as a great cementing force for national integration." *Biography of a Nation of Joiners, supra*, at 25.

In modern times, as the means of communicating with his fellows becomes increasingly inaccessible to the single individual, the right of association has assumed greater importance because only by associating with others can an individual multiply his resources and gain access to the media. See, e.g., *Buckley*, 424 U.S. at 19.

2. Judicial Recognition of the Right of Association

In keeping with the unique importance of voluntary associations, this Court has repeatedly recognized "freedom of association" as one of the preferred rights derived from the First

Amendment's guarantees of speech, press, petition and assembly. L. Tribe, *American Constitutional Law* § 12-23, at 702 (1978). See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 911; *Citizens Against Rent Control*, 454 U.S. 290; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Democratic Party of the United States v. La Follette*, 450 U.S. 107 (1981); *Buckley*, 424 U.S. at 15; *NAACP v. Button*, 371 U.S. 415, 430 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

These guarantees, though not identical, are inseparable. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This is because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460; see, e.g., *Citizens Against Rent Control*, 454 U.S. at 295; *Buckley*, 424 U.S. at 15. In the Babel of modern society, the right of association is what amplifies the individual's voice and permits him to be heard. It ensures "that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294.

Thus, the right of association is most sacrosanct where a group or its members are engaging in the advancement of beliefs and ideas, however controversial, see, e.g., *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Button*, 371 U.S. at 430-431; *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, or in political advocacy, see, e.g., *Buckley*, 424 U.S. at 14-15; *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 3252 (1984). Indeed, just as freedom of expression extends to vigorous express advocacy, the freedom to associate "en-

compasses the right to support a candidate of one's choice . . . and to assist in developing support for that candidate." *Morial v. Judiciary Comm'n*, 438 F. Supp. 599, 608 (E.D. La. 1977), *rev'd on other grounds*, 565 F.2d 295 (5th Cir.), *cert. denied*, 435 U.S. 1013 (1978).

3. If Construed to Prohibit Dissemination and Distribution by MCFL of Its Newsletter, Section 441b Would Abridge MCFL's and Its Members' Associational Rights.

That the government has taken no direct action to restrict MCFL members in their right to associate hardly ends the inquiry. Decisions of this Court recognize that abridgment of the right of association, like other fundamental rights, may inevitably follow, even though unintended, from varied, and even subtle, forms of government action. See, e.g., *Healy v. James*, 408 U.S. 169, 181 (1971); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 461; L. Tribe, *American Constitutional Law* § 12-23, at 704.

Government cannot interfere with activity integral to association in the sense that the association's protected purposes would be significantly frustrated were the activity disallowed. MCFL's newsletter is such an integral activity. L. Tribe, *American Constitutional Law* § 12-23, at 704. For example, in *Healy v. James*, 408 U.S. 169, a college's attempt to prevent an SDS chapter from holding meetings or using the school bulletin board or newspaper was held to violate associational interests because it could only remain a viable entity by communicating with students. The decision would have been no different if SDS had been incorporated.

Similarly, this Court's election law cases indicate that expenditure limitations "impinge on protected associational freedoms," e.g., *Buckley*, 424 U.S. at 22; *FEC v. NCPAC*, 105 S. Ct. 1459, because any limitation on independent expenditures "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recogni-

tion of First Amendment protection of the freedom of association." *Id.* (Citations omitted.)

Such limitations strike at the very reason individuals have joined together:

One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however, they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication . . .

. . . . To require that contributors . . . literally draft their own television and other public messages is naive. . . . It emasculates the guaranteed right of association to disallow [associations] from organizing and focusing the views of their adherents.

Common Cause v. Schmitt, 512 F. Supp. 489, 497 (D.D.C. 1980), *aff'd* 455 U.S. 129 (1982). In *Common Cause v. Schmitt*, the court held that there could be no limit upon independent expenditures made by political committees. *See also*, *FEC v. NCPAC*, 105 S. Ct. 1459 (expenditure limits on incorporated political action committee unconstitutional). If a limitation "emasculates the guaranteed right of association," clearly the total prohibition upon any expenditure by MCFL emasculates its guaranteed right of association.

Indeed, a restriction on corporate expenditures impinges most heavily on corporations, like MCFL, which incorporate to further the right of association. Justice White, who dissented in *Bellotti*, suggested as much, stating, 435 U.S. at 805:

Undoubtedly, . . . there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating informa-

tion and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression.

See also id. at 812 n.12.

If § 441b is construed to prohibit the dissemination of MCFL's newspaper, it undercuts an activity integral to MCFL. MCFL was organized for the express purpose of fostering respect for human life and defending the right to life of all human beings "through educational, political and other forms of activity." J.A. 84. From the outset, MCFL and its members have recognized that the newsletter is central to their efforts. J.A. 87-88, 90, 97-98. Moreover, MCFL began publishing the positions of candidates on pro-life issues in response, in part, to numerous inquiries from its members concerning the positions of candidates. J.A. 99. Obviously, prohibiting MCFL from making the types of expenditures at issue here precludes it from effectively amplifying the voice of its adherents.

Finally, at a minimum, § 441b compels MCFL to finance the Special Election Editions through a PAC and as a penalty for exercising its right to speak requires disclosure of the names of MCFL's members. In an analogous situation, the Court of Appeals in *Buckley*, in a part of the decision not appealed to this Court, stated: "[i]t is well established that compelled disclosure of the kind of information section 437a exacts can work a substantial infringement of the associational rights of those whose organizations take public stands on public issues (citations omitted)." *Buckley v. Valeo*, 519 F.2d at 872. The section of the Act at issue there required disclosure of the names of contributors where a group published material "'set[ting] forth a candidate's position on any public issue, his voting record, or other official acts' with a design[] to influence 'voting at an election'." *Id.* at 870. The Court noted, *id.* at 877:

Section 437a might, of course, leave open one avenue for groups wishing to maintain the privacy of their contributor lists while discussing public issues:

they could refrain from mentioning candidates' positions or listing incumbents' voting records. But to do this, the group would have to be extremely careful about mentioning even the names of those who held a particular position on an issue, lest one of them turn out to be a candidate for federal office, thereby triggering § 437a. Such a watered-down and cautious discussion is hardly the "uninhibited, robust and wide-open" debate on public issues which the First Amendment was designed to foster.

(Citations omitted.) Accordingly, the Court held that the statute was unconstitutionally vague and an abridgement of associational rights. *Id.* at 878.

Despite suggestions to the contrary in the FEC's brief, FEC Brief at 35-36, MCFL is not seeking a special privilege in the disclosure arena for ideological corporations. In 1978, as now, if an ideological corporation's primary activity were the advocacy of the election or defeat of candidates — which is not the case with MCFL — it would be a political committee, *Buckley*, 424 U.S. at 79, and the names of contributors of over \$200 in the aggregate in a year would have to be disclosed, 2 U.S.C. § 434(b)(3). An ideological corporation which otherwise engaged in express advocacy independent expenditures would be governed by the same regulations affecting individuals and other groups of persons. Disclosure of the expenditure would be required, § 434(e), if it were more than \$100. Today that limit is \$250, but if \$200 is received earmarked for expenditures yet another disclosure report is required. 2 U.S.C. § 434(c) (1985). The numerous grass roots contributors who buy roses, or make small contributions to a controversial ideological corporation could do so without fear that their names would be disclosed.

C. Section 441b Impinges on MCFL's and Its Members' Freedom of Press.

The liberty of the press secured by the First Amendment is not the special province of the traditional "institutional press," but is a fundamental right which comprehends every sort of publication. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).²⁵ See also *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972); *Schneider v. State*, 308 U.S. 147, 164 (1939). There is nothing in the First Amendment's policy or history which turns the application of its protections upon the difference between regular and merely casual or occasional distributions. *United States v. CIO*, 335 U.S. at 155 (Rutledge, J., concurring).

Like freedom of speech, freedom of the press is most sacrosanct where it involves comments on the political process.²⁶ See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Thus, if section 441b is construed to prohibit publication and dissemination by MCFL of its newsletters, it impinges on the freedom of press guaranteed to MCFL and its members.

²⁵ In *Lowe v. SEC*, this Court reaffirmed that the liberty of the press is truly a liberty of publication. See in particular *Lowe*, 105 S. Ct. at 2571, where *Lovell v. City of Griffin*, 303 U.S. 444, 4351-452 (1938) is quoted with approval ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.") See also *Beltoni*, 435 U.S. at 799-800 ("The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion," per Burger, C.J., concurring).

²⁶ Indeed, a truly nonpartisan press is foreign to American history. Although at the outset newspapers had been set up merely as auxiliaries to printing establishments, after the American revolution: "[Newspapers] were more and more founded as spokesmen of political parties. This gave a new dignity and a new color to American Journalism." F. L. Mott, *American Journalism — A History of Newspapers in the United States*, 113-114 (1949). During the presidential campaigns of 1796-1797 and 1800, the papers were described as "overrunning with electioneering essays, squibs, and invectives." *Id.* at 121.

Ironically, it would silence a publication more akin to the newspapers circulated at the time the First Amendment was written than the publications now printed by media conglomerates and blessed by the FEC. The newspaper in American history began as a "small sheet, insignificant alike in matter and appearance, published at considerable intervals, and including but few in its visits." T.M. Cooley, *Constitutional Limitations*, 451 (1868). Further, it would chill the activities of numerous other organizations having similar publications. See R. 35-111, and S.A., Section C.

D. *Section 441b Does Not Serve a Sufficiently Compelling State Interest to Justify the Substantial Restriction on the First Amendment Rights of MCFL and Its Members.*

1. § 441b Must be Given Strict Scrutiny.

The Act cannot avoid strict scrutiny merely because it prohibits expenditures rather than expressly affecting speech. In *Buckley*, the Court held that expenditure limitations are direct and substantial limitations on speech. That holding was reaffirmed in *FEC v. NCPAC*, 105 S. Ct. 1459.

Because core First Amendment rights are at stake, the statute is not entitled to the usual presumption of validity afforded to legislation. See *Schneider v. State*, 308 U.S. 147, 161 (1939). "The presumption rather is against the legislative intrusion into those domains." *United States v. CIO*, 335 U.S. at 140-141 (Rutledge, J. concurring). The cases cited by the FEC do not hold otherwise, e.g., *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 103 (1973) ("That is not to say that we 'defer' to the judgment of Congress . . . on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission had not fulfilled its task with appropriate sensitivity to the interests in free expression.") The strict scrutiny standard is applicable because § 441b infringes freedom of speech, association and press, and also because the section is content-based. The con-

stitutionality of § 441b turns on whether the governmental interest advanced by the state in its support can satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45.

2. Section 441b Cannot Survive Strict Scrutiny.

When § 441b is subjected to the rigorous scrutiny required by the Constitution it cannot pass muster. The FEC has advanced the following allegedly significant interests 1) preventing corruption, (FEC Brief 29-31), 2) protecting individuals who have paid money into a corporation from having that money used to support candidates to whom they may be opposed (31-33), and 3) promoting public disclosure of the sources of campaign financing (33-36). These reasons do not add up to a compelling purpose.

a. *Corruption*. The "corruption" to be avoided arises when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *FEC v. NCPAC*, 105 S. Ct. 1459. Lobbying by corporations is constitutionally protected. *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Precisely how independent expenditures by corporations can be corrupting but lobbying is not is never explained by the FEC. See *Bellotti*, 435 U.S. at 791-792 n.31.

The interest in avoiding "corruption" may justify restrictions on campaign contributions to a candidate. It, however, has a limited application to truly independent expenditures which, by definition, are not prearranged by, or orchestrated with, the candidate. Such lack of coordination undermines the value to the candidate of the expenditures and substantially alleviates the danger that they will be given as a *quid pro quo*. *Buckley*, 424 U.S. at 47. See *Citizens Against Rent Control*, 454 U.S. at 297. Indeed, independent expenditures may well prove "counterproductive" to a candidate's campaign. *Buckley v.*

Valeo, 424 U.S. at 47. (In fact, in 1981 the Chairman of the Republican National Committee complained "anyone who spends money, even a penny, on a campaign, should be responsible to a candidate's party. The independent groups are not responsible to anyone." "GOP Chairman Condemns Negative Ad Campaigns," *The Los Angeles Times*, April 28, 1981). By publishing its newsletters, MCFL is ensuring that the voters on either side of the abortion issue will be able to make an informed choice and is thereby enhancing the accountability of candidates. *Cf. Brown v. Hartlage*, 456 U.S. 45. Since a majority of the population does not agree with MCFL's anti-abortion stance, "[t]o the extent [the newsletter] was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospect of election of candidates subscribing to defendants' [sic] platform. . . ." J.S. App. 31a. The potential for corruption is limited still further where the expenditure is not only independent, but, as here, public. *Cf. Brown v. Hartlage*, 456 U.S. 45.

The FEC's real gripe seems to be with the Court's holdings in *Buckley* and its progeny that expenditures do not lose their highly protected status no matter how large or effective they may be. The notion of equalizing the relative ability of individuals and groups to influence the outcome of elections is "wholly foreign" to the First Amendment which protects effective speech no less than ineffective speech, and corporations, as well as individuals. *Id.* at 48-49, 58-59. See, e.g., *Bellotti*, 435 U.S. at 784, 790-791; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 533 (1980); *NAACP v. Button*, 371 U.S. at 428.

Certainly the danger of corruption does not exist, as the Court of Appeals found, in the case of grass roots, nonpartisan, nonprofit issue-oriented corporations such as MCFL where the independent expenditures sought to be proscribed are minimal and went toward the publication of candidates' positions on issues of concern to a large number of voters. MCFL did not have access to vast sums. J.A. 84-85. The total amount spent for the two newsletters at issue was \$9,812.00, which, when

divided by the number (492) of candidates listed, represents approximately \$20.00 per candidate, hardly a sum which generates concern about corruption. J.A. 101.

Furthermore, although ideological corporations may attract contributions, and, perhaps, raise substantial sums, the expenditure of those sums by such a corporation does not constitute the injection into the political process of vast wealth accumulated for other purposes simply waiting to be unleashed. *Cf. Pipefitters v. United States*, 407 U.S. 385, 423 (1972) (citing legislative history to the effect that the purpose of the predecessor of § 441b was to avoid the diversion of "substantial general purpose treasuries" to political purposes); *United States v. CIO*, 335 U.S. at 122 (characterizing the congressional purpose as one of strengthening the bars against the misuse of "aggregated funds"). Moneys spent by MCFL are moneys given or raised by individuals who believe in the pro-life cause espoused by MCFL. A candidate will be no more indebted to the organization, MCFL, than to the elements of the constituency whose interests are voiced by that organization. *Cf., e.g., Common Cause v. Schmitt*, 512 F. Supp. at 498. As *Bellotti* and *NAACP v. Button* make clear, First Amendment protection does not evaporate if individuals acting in association choose to incorporate that association.

On this general topic, it should be apparent that not all entities generating business revenues are corporations. Partnerships, business trusts, joint ventures and the like are capable of producing huge sums from commerce. Conversely, not all corporations generate business revenues, witness MCFL. If sums accumulated by business activity are deemed somehow to be more potentially corrupting than other accumulations, so that they should be kept out of the political arena even as independent expenditures, then Congress should address this problem directly and not resort to short cut methods which catch the sardine with the salmon and even let some salmon escape.

MCFL was engaging in direct political speech, "not the solicitation of contributions from 267,000 individuals as in

FEC v. NRWC, 459 U.S. 197, nor 'speech by proxy,' *California Medical Association v. FEC*, 453 U.S. 182, 196, n.16 (1981)." J.S. App. 37a. The District Court below stated:

the defendant's special election editions were the very antithesis of a corrupting agreement or contribution. They were open, strived for accuracy, reported on every candidate regardless of prospects of elections and urged readers to vote on election day. They sought to influence incumbents and candidates solely by means of informed voter reaction to the candidates' positions on an important public issue. Far from being an improper influence, or eroding public confidence in the electoral process, or threatening its integrity, *FEC v. NRWC*, *supra* at 207-208, they would seem to promote rather than undermine the honest functioning of representative government.

J.S. App. 37a.

In short, section 441b does not serve a sufficiently important state interest when applied to MCFL and its members.²⁷ The only interest of potential constitutional significance — the need to prevent corruption or the appearance of corruption — simply is not served by the statute as applied to independent expenditures by grass roots, nonpartisan, nonprofit associations.²⁸

²⁷ Note, contrary to the FEC's argument, *FEC v. NRWC*, 459 U.S. 197, does not govern this case. The Court of Appeals rejected such an argument stating; J.S. App. 23a:

the instant case, unlike *National Right to Work Committee*, involves a corporation's indirect and uncoordinated expenditures in connection with a federal election, not a solicitation for direct contributions to candidates. See *Federal Election Commission v. National Conservative Political Action Committee*, 53 U.S.L.W. 4293, 4296 (U.S., March 18, 1985). ('NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.')

²⁸ Even if corruption were a danger, section 441b is at once ineffective and over-intrusive. On one hand, the necessity of interpreting the statute to preclude

b. *Protection of Minority Interests.* The FEC is also concerned that contributors to MCFL may have their contributions used to support political candidates to whom they may be opposed. FEC Brief at 31.²⁹ Laying aside the fact that MCFL did not "support political candidates," it is not clear who the FEC is worried about. Stockholders? There were none. Members? As a non-membership corporation, MCFL apparently had none. There were many people interested enough in the organization to support its goals by buying red roses, making small contributions, and attending dinner dances. As the Court of Appeals stressed, J.S. App. 22-23a:

contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue.

Contributors who do not like what MCFL is doing with their money can stop contributing; no one is compelled to support

only those communications containing express advocacy undermines its ability to serve the asserted governmental interest. This Court stated as much in *Buckley*, 424 U.S. at 45. Section 441b is also ineffective because it does not purport to reach lobbying — an activity far more susceptible of improper influence of representative decisionmakers. It is also overbroad. The government has not demonstrated, as it must, that its interest (in preventing corruption or the appearance of corruption) cannot be protected adequately by more limited regulation. See, e.g., *Central Hudson Gas & Elect. Corp. v. Public Service Commission*, 447 U.S. 557, 565 (1980); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *United States v. CIO*, 335 U.S. at 141, 145 (Rutledge, J., concurring).

²⁹ The FEC's solution for the protection of the MCFL contributor who does not wish to support candidates to which he may be opposed is to force MCFL to finance its Special Election Editions through a PAC. However, since the FEC claims that MCFL can completely control its PAC it would appear that contributors to the PAC would be similarly unprotected. In fact this very point was raised by the dissent in *NCPAC*, 105 S. Ct. at 1477-1478. "It can safely be assumed that each contributor does not fully support every one of the variety of activities undertaken and candidates supported by the PAC to which he contributes." (White, J., dissenting.)

MCFL. Since contributors to MCFL do not have another primary economic purpose for their affiliation with MCFL, such as stockholders and union members would have, the interest in protecting the minority, generally at best a "secondary concern," *Cort v. Ash*, 422 U.S. 66, 81 (1975), is not implicated.

In any event, MCFL began publishing the Special Election Editions, in part, because of requests from its members. J.A. 99. With the information MCFL provides, voters can decide to vote for candidates on whatever criteria they choose. They may utilize the information to vote solely for pro-life candidates or, if they choose, they can vote for candidates based on their positions on other issues. Without MCFL's publication, voters are *less informed*. MCFL's publication of candidates' positions on pro-life issues provided information which the district court found was "probably not available elsewhere," J.S. App. 32a, and guaranteed each of the newsletter's readers "the opportunity to make a personal decision about the political options he or she will support." FEC Brief, at 32.

c. *Public Disclosure of Sources of Federal Campaign Financing*. Grasping at a final straw, the FEC argues that § 441b is justified by the public interest in disclosure of sources of independent expenditures. By "sources" the FEC presumably means each of MCFL's contributors. The FEC has not bothered to explain why the names of MCFL's contributors must be disclosed other than that disclosure is a "good thing." *Buckley* requires that a disclosure provision be "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Buckley*, 424 U.S. at 81. It is the government's burden to show that there is some purpose for disclosure, other than for disclosure's sake, particularly where such disclosure will impinge upon associational rights. *Id.* Since contributions to MCFL are made solely to further MCFL's various activities and are not earmarked for any political purpose, it is not likely that a candidate could become indebted to any particular contributor. Any corruption, real or imagined, is avoided. While express advocacy expenditures may bear a

sufficient relationship to a candidate or his campaign to require disclosure, *Buckley*, 424 U.S. at 81, non-earmarked contributions to MCFL are not so "campaign related" that the interest in disclosure outweighs MCFL's and its members' associational interests. *In any event, § 441b is not a disclosure provision*. If Congress wants the names of all contributors to a non-profit corporation which engages in any express advocacy to be made public, it could enact such a statute. Whether such a disclosure statute could survive constitutional scrutiny is not before this Court.

The FEC has not been candid in arguing that the Court of Appeals' decision means that "because it is a corporation, MCFL has a first amendment right to make group political expenditures on behalf of its supporters without the inconvenience of complying with these regulations, while other groups of individuals who have not incorporated do not." FEC Brief at 26. The definition of a political committee encompasses groups under the control of a candidate or the major purpose of which is the nomination or election of a candidate, *see, e.g., Buckley*, 424 U.S. at 79; *United States v. National Comm. for Impeachment*, 469 F.2d at 1139-1142, unquestionably not the case for MCFL.³⁰ Cf. A-O 1982-13, 1 Fed. Elec. Camp. Fin. Guide, ¶ 5658 (law partnership which made \$1000 contribution not a political committee).

MCFL is subject to the same disclosure provisions as other advocacy organizations which do not primarily advocate the election or defeat of candidates. Persons (other than political committees) are required to identify the source of any contribution they receive exceeding \$200 earmarked for "express advocacy" purposes. 2 U.S.C. § 434(c) (1984). Contributions less than \$200 are unlikely to lead to the corruption feared by the FEC. MCFL also must file a report whenever it makes an express advocacy expenditure of more than \$250. *Id.*

³⁰ FEC raises for the first time in this Court the hypothetical possibility that MCFL might have been a political committee. In addition to the charge that MCFL had violated § 441b, the FEC also initially investigated a charge that MCFL was a political committee but found at the probable cause stage that it was not — a finding it now apparently wishes it had not made and conveniently forgets to mention. *See R.* 328.

The spectre of business money secretly being funnelled through ideological corporations without public disclosure is a fantasy made possible only by ignoring the rest of the Act and regulations, not to mention the facts of this case since MCFL accepted no corporate contribution. Not only must contributions exceeding \$200 be disclosed by the recipient if earmarked for express advocacy, but also § 441b continues, under the FEC's construction of the statute, to prohibit corporate business contributions and expenditures "in connection with any election." Contributions by a business corporation to an ideological corporation to enable the ideological corporation to make expenditures in connection with an election undoubtedly would be deemed by the FEC to violate that provision. The provision requiring disclosure of earmarked contributions answers the FEC's concern that potential violations of the statute by business corporations would go undetected.

And if it is constitutional for the government to prohibit business corporations from making any contributions to a non-profit group which engages in express advocacy or to prohibit nonprofit ideological corporations which accept corporate contributions from engaging in express advocacy, points which MCFL does not concede, there are certainly other, more direct and narrowly tailored methods of achieving these prohibitions without trampling on the First Amendment rights of nonprofit ideological corporations funded solely by individuals.

E. Section 441b Is Invalid As An Unconstitutional Denial of Equal Protection of the Laws.

Section 441b denies MCFL its right to equal protection of the laws as guaranteed by the Fifth Amendment. The due process clause of the Fifth Amendment "yield[s] norms of equal treatment indistinguishable from those of the equal protection clause." L. Tribe, *American Constitutional Law*, § 16-1 at 992. See, e.g., *Buckley*, 424 U.S. at 93. If, as the FEC suggests, the exemption in § 431(f)(4)(A) is a "communications media" exemption, FEC Brief at 7, or a "news media" exemp-

tion, FEC Brief at 18, § 441b denies MCFL equal protection of the laws. When the classification is one "affecting First Amendment interests," a strict scrutiny test is applied. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). MCFL's First Amendment rights should be afforded the greatest possible protection because political discussion and the intelligent use of the franchise are at stake. "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. See also *United States v. UAW*, 352 U.S. at 570.

The government's interest in ensuring an election free from corruption or even its arguable interest in protecting contributors against the use of funds for support of or in opposition to candidates are not sufficiently compelling to justify prohibiting MCFL from expending any money to publish its views on candidates while permitting business conglomerates, which publish daily newspapers, to expend unlimited sums of money to express their views.

The institutional press is simply part of the public, and its rights are no greater than the rights of the general public. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572-573 (1980); *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring); *Dun & Bradstreet v. Greenmoss Builders*, 105 S. Ct. at 2953, 2958 (1985). See also *Buckley*, 424 U.S. at 51 n.50, where the Court recognized that exempting the institutional press from limitations on political expenditures would not have saved the statute from First Amendment attack. Of course, if there were only one established newspaper in a particular area, the effect of treating § 431(f)(4)(A) as a "media" exemption would be to create a monopoly.

If the exemption is a "news media" exemption, § 441b burdens the First Amendment rights of non-media corporations to a greater extent than it burdens those rights for media corporations. None of the compelling purposes cited by the FEC justify this distinction. It does not serve to protect the integrity of the electoral process from the alleged undue influence that could be exerted by aggregations of money accumulated through

the use of the media corporate form. It does not serve to protect individuals whose money goes to make up a media corporation's treasury from having that money used to support political candidates to whom they may be opposed. Such protection would, if anything, appear to be more necessary in the case of a publicly-held media corporation than for a nonprofit ideological corporation. Also, to the extent that the newsletter the FEC seeks to proscribe is public, the electorate is informed about the source of campaign financing. The electorate knows, from reading the newsletter, that it is published by MCFL. It may not know who MCFL's members are but then neither does the electorate know who the *Boston Herald's* stockholders are. The distinction the FEC proposes does not further a compelling government purpose and, in fact, the FEC has not attempted to proffer one.

In conclusion, § 441b fails to afford the "breathing space" which First Amendment freedoms need to survive. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). It is a sad commentary that even now, in the last two decades of the twentieth century, an ideological organization must struggle with the government of the United States to be able to publish truthfully the positions of candidates for public office on a controversial public issue.

Conclusion.

Appellee MCFL respectfully requests this Court to affirm the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX.

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

§ 431. Definitions

When used in this chapter —

(a) "election" means —

- (1) a general, special, primary, or runoff election;
- (2) a convention or caucus of a political party which has authority to nominate a candidate;
- (3) a primary election held for the selection of delegates to a national nominating convention of a political party; and
- (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has —

- (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office; or

(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States; or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding \$1,000;

(e) "contribution" —

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of —

(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party; or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose, except that this paragraph shall not apply in the case of legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), other than services attributable

to activities which directly further the election of a designated candidate or candidates to Federal office, nor shall this paragraph apply in the case of legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of ensuring compliance with the provisions of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported in accordance with the requirements of section 434(b); but

(5) does not include —

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee

with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising;

(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b would not constitute an expenditure by such corporation or labor organization;

(G) a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, but such loans —

(i) shall be reported in accordance with the requirements of section 434(b); and

(ii) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors;

(H) a gift, subscription, loan, advance, or deposit of money or anything of value to a national committee of a political party or a State committee of a political party which is specifically designated for the purpose of defraying any cost incurred with respect to the construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office, except that any such gift, subscription, loan, advance, or deposit of money or anything of value, and any such cost, shall be reported in accordance with section 434(b); or

(I) any honorarium (within the meaning of section 441i); to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed \$500 with respect to any election;

(f) "expenditure" —

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of —

(A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of Presidential and Vice Presidential elector; or

(B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure;

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include —

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote, or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office except that the costs incurred by a membership organization, including a labor organization or by a corporation, directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate) shall, if those costs exceed \$2,000 per election, be reported to the Commission;

(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities if the cumulative value of such activities by such individual on behalf of any candidate do not exceed \$500 with respect to any election;

(E) any unreimbursed payment for travel expenses made by an individual who, on his own behalf, volunteers his personal services to a candidate if the cumulative amount for such individual incurred with respect to such candidate does not exceed \$500 with respect to any election;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising;

(H) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of section 441b, would not constitute an expenditure by such corporation or labor organization;

(I) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitations applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b);

(J) the payment, by any person other than a candidate or political committee, of compensation for legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), other than services attributable to activities which directly further the election of a

designated candidate or candidates to Federal office, or the payment for legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of ensuring compliance with the provisions of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported under section 434(b); or

(K) a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, but such loan shall be reported in accordance with section 434(b);

(g) "Commission" means the Federal Election Commission;

(h) "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons;

(i) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(j) "identification" means —

(1) in the case of an individual, his full name and the full address of his principal place of residence; and

(2) in the case of any other person, the full name and address of such person;

(k) "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission;

(l) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission;

(m) "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office, whose name appears on the election ballot as the candidate of such association, committee, or organization;

(n) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432(e)(1) of this title;

(o) "Act" means the Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974 and the Federal Election Campaign Act Amendments of 1976;

(p) "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(q) "clearly identified" means that (1) the name of the candidate appears; (2) a photograph or drawing of the candidate appears; or (3) the identity of the candidate is apparent by unambiguous reference.

§ 432. Organization of political committees¹

(a) *Chairman; treasurer; vacancies; official authorizations.* Every political committee shall have a chairman and a treasurer.

¹ The former Sec. 432(e), "Unauthorized activities; notice," was stricken from the United States Code by P.L. 94-283. Its provisions are now governed by Sec. 441d.

No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of chairman or treasurer thereof. No expenditure shall be made for or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) *Account of contributions; segregated funds.* Every person who receives a contribution in excess of \$50 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount of the contribution and the identification of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) *Recordkeeping.* It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of —

- (1) all contributions made to or for such committee;
- (2) the identification of every person making a contribution in excess of \$50, and the date and amount thereof and, if a person's contributions aggregate more than \$100, the account shall include occupation, and the principal place of business (if any);
- (3) all expenditures made by or on behalf of such committee; and
- (4) the identification of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) *Receipts; preservation.* It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of \$100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds \$100. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the Commission.

(e) *Principal campaign committee; reports, filing.*

(1) Each individual who is a candidate for Federal office (other than the office of Vice President of the United States) shall designate a political committee to serve as his principal campaign committee. No political committee may be designated as the principal campaign committee of more than one candidate, except that the candidate for the office of President of the United States nominated by a political party may designate the national committee of such political party as his principal campaign committee. Except as provided in the preceding sentence, no political committee which supports more than one candidate may be designated as a principal campaign committee. Any occasional, isolated, or incidental support of a candidate shall not be construed as support of such candidate for purposes of the preceding sentence.

(2) Notwithstanding any other provision of this title, each report or statement of contributions received or expenditures made by a political committee (other than a principal campaign committee) which is required to be filed with the Commission under this title shall be filed instead with the principal campaign committee for the candidate on whose behalf such contributions are accepted or such expenditures are made.

(3) It shall be the duty of each principal campaign committee to receive all reports and statements required to be filed with it under paragraph (2) of this subsection and to compile and file such reports and statements, together with its own reports and statements, with the Commission in accordance with the provisions of this title.

§ 433. Registration of political committees

(a) *Statements of organization.* Each political committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding \$1,000 shall file with the Commission a statement of organization, within 10 days after its organization or, if later, 10 days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of \$1,000. Each such committee in existence at the date of enactment of this Act shall file a statement of organization with the Commission at such time as it prescribes.

(b) *Contents of statements.* The statement of organization shall include —

- (1) the name and address of the committee;
- (2) the names, addresses, and relationships of affiliated or connected organizations;
- (3) the area, scope, or jurisdiction of the committee;
- (4) the name, address, and position of the custodian of books and accounts;
- (5) the name, address, and position of other principal officers, including officers and members of the finance committee, if any;
- (6) the name, address, office sought, and party affiliation of —

(A) each candidate whom the committee is supporting; and

(B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party;

(7) a statement whether the committee is a continuing one;

(8) the disposition of residual funds which will be made in the event of dissolution;

(9) a listing of all banks, safety deposit boxes, or other repositories used;

(10) a statement of the reports required to be filed by the committee with State or local officers, and, if so, the names, addresses, and positions of such persons; and

(11) such other information as shall be required by the Commission.

(c) *Information changes; report.* Any change in information previously submitted in a statement of organization shall be reported to the Commission within a 10-day period following the change.

(d) *Disbanding of political committees or contributions and expenditures below prescribed ceiling; notice.* Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding \$1,000 shall so notify the Commission.

(e) *Committees other than principal campaign committee; filing of reports.* In the case of a political committee which is not a principal campaign committee, reports and notifications required under this section to be filed with

the Commission shall be filed instead with the appropriate principal campaign committee.

§ 434. Reports

(a) *Receipts and expenditures; completion date, exception.*

(1) Except as provided by paragraph (2), each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it.

The reports referred to in the preceding sentence shall be filed as follows:

(A) (i) In any calendar year in which an individual is a candidate for Federal office and an election for such Federal office is held in such year, such reports shall be filed not later than the 10th day before the date on which such election is held and shall be complete as of the 15th day before the date of such election; except that any such report filed by registered or certified mail must be postmarked not later than the close of the 12th day before the date of such election;

(ii) such reports shall be filed not later than the 30th day after the date of such election and shall be complete as of the 20th day after the date of such election.

(B) In any other calendar year in which an individual is a candidate for Federal office, such reports shall be filed after December 31 of such calendar year, but not later than January 31 of the following calendar year and shall be complete as of the close of the calendar year with respect to which the report is filed.

(C) Such reports shall be filed not later than the 10th day following the close of any calendar quarter in which the candidate or political committee concerned received contributions in excess of \$1,000, or made expenditures in excess of \$1,000, and shall be complete as of the close of such calendar quarter: except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph. In any year in which a candidate is not on the ballot for election to Federal office, such candidate and his authorized committees shall only be required to file such reports not later than the 10th day following the close of any calendar quarter in which the candidate and his authorized committees received contributions or made expenditures, or both, the total amount of which, taken together, exceeds \$5,000, and such reports shall be complete as of the close of such calendar quarter; except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph.

(D) When the last day for filing any quarterly report required by subparagraph (C) occurs within 10 days of an election, the filing of such quarterly report shall be waived and superseded by the report required by subparagraph (A)(i).

Any contribution of \$1,000 or more received after the 15th day, but more than 48 hours, before any election shall be reported within 48 hours after its receipt.

(2) Each treasurer of a political committee authorized by a candidate to raise contributions or make expenditures on his behalf, other than the candidate's principal cam-

paigned committee, shall file the reports required under this section with the candidate's principal campaign committee.

(3) Upon a request made by a Presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates set forth in paragraph (1) (other than the reporting date set forth in paragraph (1)(B)), and require instead that such candidate or political committee file reports not less frequently than monthly. The Commission may not require a Presidential candidate or a political committee operating in more than one State to file more than 12 reports (not counting any report referred to in paragraph (1)(B)) during any calendar year. If the Commission acts on its own motion under this paragraph with respect to a candidate or a political committee, such candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of Title 5, United States Code.

(b) *Contents of reports.* Each report under this section shall disclose —

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggregate amount or value in excess of \$100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);

(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of \$100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender, endorsers, and guarantors, if any, the date and amount of such loans;

(6) the total amount of proceeds from —

(A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event;

(B) mass collections made at such events; and

(C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;

(7) each contribution, rebate, refund, or other receipt in excess of \$100 not otherwise listed under paragraphs (2) through (6);

(8) the total sum of all receipts by or for such committee or candidate during the reporting period, together with total receipts less transfers, between political committees which support the same candidate and which do not support more than one candidate;

(9) the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of \$100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

(10) the identification of each person to whom an expenditure for personal services, salaries, and reimbursed

expenses in excess of \$100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;

(11) the total sum of expenditures made by such committee or candidate during the calendar year, together with total expenditures less transfers between political committees which support the same candidate and which do not support more than one candidate;

(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the Commission may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the Commission may require until such debts and obligations are extinguished, together with a statement as to the circumstances and conditions under which any such debt or obligation is extinguished and the consideration therefor;

(13) in the case of an independent expenditure in excess of \$100 by a political committee, other than an authorized committee of a candidate, expressly advocating the election or defeat of a clearly identified candidate, through a separate schedule (a) any information required by paragraph (9) stated in a manner which indicates whether the independent expenditure involved is in support of, or in opposition to, a candidate; and (b) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(14) such other information as shall be required by the Commission.

When committee treasurers and candidates show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

(c) *Cumulative reports for calendar year; amounts for unchanged items carried forward; statement of inactive status.* The reports required to be filed by subsection (a) of this section, shall be cumulative during the calendar year to which they relate, but where there has been no change in a item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

(d) *Members of Congress, reporting exemption.* This section does not require a Member of the Congress to report, as contributions received or as expenditures made, the value of photographic, matting, or recording services furnished to him by the Senate Recording Studio, the House Recording Studio, or by an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives and who furnishes such services as his primary duty as an employee of the Senate or House of Representatives, or if such services were paid for by the Republican or Democratic Senatorial Campaign Committee, the Democratic National Congressional Committee, or the National Republican Congressional Committee. This subsection does not apply to such record services furnished during the calendar year before the year in which the Member's term expires.

(e) *Contributions or expenditures by person other than political committee or candidate.*

(1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of \$100 during a calendar year

shall file with the Commission, on a form prepared by the Commission, a statement containing the information required of a person who makes a contribution in excess of \$100 to a candidate or political committee and the information required of a candidate or political committee receiving such a contribution.

(2) Statements required by this subsection shall be filed on the dates on which reports by political committees are filed. Such statements shall include (A) the information required by subsection (b)(9), stated in a manner indicating whether the contribution or independent expenditure is in support of, or opposition to, the candidate; and (B) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. Any independent expenditure, including those described in subsection (b)(13), of \$1,000 or more made after the 15th day, but more than 24 hours, before any election shall be reported within 24 hours of such independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all expenditures separately, including those reported under subsection (b)(13), made with respect to each candidate, as reported under this subsection, and for periodically issuing such indices on a timely pre-election basis.

§ 435. Requirements relating to campaign advertising

(a) No person who sells space in a newspaper or magazine to a candidate, or to the agent of a candidate, for use in con-

nection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

(b) Each political committee shall include on the face or front page of all literature and advertisements soliciting contributions the following notice:

"A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C."

§ 436. Formal requirements respecting reports and statements

(a) *Copy; preservation.* A copy of a report or statement shall be preserved by the person filing it for a period of time to be designated by the Commission in a published regulation.

(b) *Waiver of reporting requirements.* The Commission may, by a rule of general applicability which is published in the Federal Register not less than 30 days before its effective date, relieve —

(1) any category of candidates of the obligation to comply personally with the reporting requirements of section 434 of this title, if it determines that such action is consistent with the purposes of this Act; and

(2) any category of political committees of the obligation to comply with the reporting requirements of such section if such committees —

(A) primarily support persons seeking State or local office; and

(B) do not operate in more than one State or do not operate on a statewide basis.

(c) *Debts, pledges, etc.; separate schedules; aggregate amounts based upon actual payment.* The Commission shall,

by published regulations of general applicability, prescribe the manner in which contributions and expenditures in the nature of debts and other contracts, agreements, and promises to make contributions or expenditures shall be reported. Such regulations shall provide that they be reported in separate schedules. In determining aggregate amounts of contributions and expenditures, amounts reported as provided in such regulations shall not be considered until actual payment is made.

(d) *Postmark as date of filing.* If a report or statement required by sections 433, 434(a)(1)(A)(ii), 434(a)(1)(B), 434(a)(1)(C), 434(c), or 434(e) of this title to be filed by a treasurer of a political committee or by a candidate or by any other person, is delivered by registered or certified mail, to the Commission or principal campaign committee with which it is required to be filed, the United States postmark stamped on the cover of the envelope or other container in which such report or statement is so mailed shall be deemed to be the date of filing.

§ 437. Reports on convention financing

Each committee or other organization which —

(1) represents a State, or a political subdivision thereof, or any group of persons, in dealing with officials of a national political party with respect to matters involving a convention held in such State or political subdivision to nominate a candidate for the office of President or Vice President, or

(2) represents a national political party in making arrangements for the convention of such party held to nominate a candidate for the office of President or Vice President, shall within 60 days following the end of the convention (but not later than 20 days prior to the date on

which Presidential and Vice Presidential electors are chosen), file with the Federal Election Commission a full and complete financial statement, in such form and detail as it may prescribe, of the sources from which it derived its funds, and the purposes for which such funds were expended.

§ 437b. Campaign depositories²

(a) (1) Each candidate shall designate one or more national or State banks as his campaign depositories. The principal campaign committee of such candidate, and any other political committee authorized by him to receive contributions or to make expenditures on his behalf, shall maintain a single checking account and such other accounts as the committee determines to maintain at its discretion at a depository designated by the candidate and shall deposit any contributions received by such committee into such account. A candidate shall deposit any payment received by him under chapter 95 or chapter 96 of Title 26 of the United States Code in the account maintained by his principal campaign committee. No expenditure may be made by any such committee on behalf of a candidate or to influence his election except by check drawn on such account, other than petty cash expenditures as provided in subsection (b).

(2) The treasurer of each political committee (other than a political committee authorized by a candidate to receive contributions or to make expenditures on his behalf) shall designate one or more national or State banks as campaign depositories of such committee, and shall maintain a checking account for the committee at each such depository. All

² Sec. 437a, "Reports by Certain Persons," was stricken from the United States Code by P.L. 94-283.

contributions received by such committee be deposited in such accounts. No expenditure may be made by such committee except by check drawn on such accounts, other than petty cash expenditures as provided in subsection (b).

(b) A political committee may maintain a petty cash fund out of which it may make expenditures not in excess of \$100 to any person in connection with a single purchase or transaction. A record of petty cash disbursements shall be kept in accordance with requirements established by the Commission, and such statements and reports thereof shall be furnished to the Commission as it may require.

(c) A candidate for nomination for election, or for election, to the office of President of the United States may establish one such depository in each State, which shall be considered as his campaign depository for such State by his principal campaign committee and any other political committee authorized by him to receive contributions or to make expenditures on his behalf in such State, under rules prescribed by the Commission. The campaign depository of the candidate of a political party for election to the office of Vice President of the United States shall be the campaign depository designated by the candidate of such party for election to the office of President of the United States.

§ 437c. Federal Election Commission

(a) (1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed by the President of the United States, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed —

(i) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) Two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his term until his successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States. Members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time such individual begins to serve as a member of the Commission shall terminate or liquidate such activity no later than 1 year after beginning to serve as such a member.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives)

shall receive compensation equivalent to the compensation paid at level IV of the executive schedule (5 U.S.C. § 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of 1 year. No member may serve as chairman more often than once during any term of office to which he is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman, or in the event of a vacancy in such office.

(b) (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954. The Commission shall have exclusive primary jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this title shall be made by a majority vote of the members of the Commission except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to establish guidelines for compliance with the provisions of this Act or with chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or for the Commission to take any action in accordance with paragraph (6), (7), (8), or (10) of section 437d(a). A member of the Commission may not delegate to any person his vote or any decision-making authority or duty vested in the Commission by the provisions of this title.

(d) The Commission shall meet at least once each month and also at the call of any member.

(e) The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) (1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the executive schedule (5 U.S.C. § 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the executive schedule (5 U.S.C. § 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he considers desirable without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the general schedule (5 U.S.C. § 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States Government. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

Editorial Note; Transition Provisions: Section 101 of the "Federal Election Campaign Act Amendments of 1976," P.L. 94-

283, contains the following transition provisions relating to the Federal Election Commission.

“(e) (1) The President shall appoint members of the Federal Election Commission under section 437c(a), as amended by this section, as soon as practicable after the date of the enactment of this Act.

(2) The first appointments made by the President under section 437c(a), as amended by this section, shall not be considered to be appointments to fill the unexpired terms of members serving on the Federal Election Commission on the date of the enactment of this Act.

(3) Members serving on the Federal Election Commission on the date of the enactment of this Act may continue to serve as such members until new members are appointed and qualified under section 437c(a), as amended by this section, except that until appointed and qualified under this Act, members serving on such Commission on such date of enactment may, beginning on March 23, 1976, exercise only such powers and functions as may be consistent with the determinations of the Supreme Court of the United States in Buckley et al. against Valeo, Secretary of the United States Senate, et al. (numbered 75-436, 75-437) January 30, 1976.

(f) The provisions of section 437c(a)(3), which prohibit any individual from being appointed as a member of the Federal Election Commission who is, at the time of his appointment, an elected or appointed officer or employee of the executive, legislative, or judicial branch of the Federal Government, shall not apply in the case of any individual serving as a member of such Commission on the date of the enactment of this Act.

“(g) (1) All personnel, liabilities, contracts, property, and records determined by the Director of the Office of Management and Budget to be employed, held, or used primarily in connection with the functions of the Federal Election Commission under Title III of the Act as such title existed on January 1, 1976, or under any other provision of law, are transferred to such Commission as constituted under the amendments made by this Act to the Federal Election Campaign Act of 1971.

(2) (A) Except as provided in subparagraph (B), personnel engaged in functions transferred under paragraph (1) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions.

(B) The transfer of personnel pursuant to paragraph (1) shall be without reduction in classification or compensation for 1 year after such transfer.

(3) All laws relating to the functions transferred under this Act shall, insofar as such laws are applicable and not amended by this Act, remain in full force and effect. All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act which are in effect at the time of the transfer provided by paragraph (1), and which are consistent with the amendments made by this Act, shall continue in effect to the same extent as if such transfer had not occurred. Any rule or regulation proposed by such Commission before the date of the enactment of this Act shall be prescribed by such Commission only if, after such date of enactment, the rule or regulation is submitted to the Senate or the House of Representatives, as the case may be,

"in accordance with the provisions of section 438(c), and it is not disapproved by the appropriate House of the Congress.

(4) The provisions of this Act shall not affect any proceeding pending before the Federal Election Commission on the date of the enactment of this Act.

(5) No suit, action, or other proceeding commenced by or against the Federal Election Commission or any officer or employee thereof acting in his official capacity shall abate by reason of the transfer made under paragraph (1). The court before which such suit, action, or other proceeding is pending may, on motion or supplemental petition filed at any time within 12 months after the date of the enactment of this Act, allow such suit, action, or other proceeding to be maintained against the Federal Election Commission if the party making the motion or filing the petition shows a necessity for the survival of the suit, action, or other proceeding to obtain a settlement of the question involved.

(6) Any reference in any other Federal law to the Federal Election Commission, or to any member or employee thereof, as such Commission existed under the Federal Election Campaign Act of 1971 before its amendment by this Act shall be held and considered to refer to the Federal Election Commission, or the members or employees thereof, as such Commission exists under the Federal Election Campaign Act of 1971 as amended by this Act."

§ 437d. Powers of Commission

(a) The Commission has the power —

(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission

shall be made within such a reasonable period of time and under oath or otherwise as the Commission may determine;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(9)), or appeal any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954;

(9) to formulate general policy with respect to the administration of this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954; and

(10) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) (1) Whenever the Commission submits any budget estimate or request to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) Except as provided in section 437g(a)(9), the power of the Commission to initiate civil actions under subsec-

tion (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437e. Reports

The Commission shall transmit reports to the President of the United States and to each House of the Congress no later than March 31 of each year. Each such report shall contain a detailed statement with respect to the activities of the Commission in carrying out its duties under this title, together with recommendations for such legislative or other action as the Commission considers appropriate.

§ 437f. Advisory opinions

(a) The Commission shall render an advisory opinion, in writing, within a reasonable time in response to a written request by any individual holding Federal office, any candidate for Federal office, any political committee, or the national committee of any political party concerning the application of a general rule of law stated in the Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or a general rule of law prescribed as a rule or regulation by the Commission, to a specific factual situation. Any such general rule of law not stated in the Act or in chapter 95 or chapter 96 of the Internal Revenue Code of 1954 may be initially proposed by the Commission only as a rule or regulation pursuant to the procedures established by section 438(c). No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(b) (1) Notwithstanding any other provision of law, any person who relies upon any provision or finding of an advisory

opinion in accordance with the provisions of paragraph (2) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(2) Any advisory opinion rendered by the Commission under subsection (a) may be relied upon by (a) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and (b) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(c) Any request made under subsection (a) shall be made public by the Commission. The Commission shall before rendering an advisory opinion with respect to such request, provide any interested party with an opportunity to transmit written comments to the Commission with respect to such request.

Editorial Note, Transition: Section 108(b) of the "Federal Election Campaign Act Amendments of 1976," P.L. 94-283, contains the following transition provision relating to advisory opinions.

"The Commission shall, no later than 90 days after the date of the enactment of this Act, conform the advisory opinions issued before such date of enactment to the requirements established by section 437f(a), as amended. The provisions of section 437f(b), as amended, shall apply with respect to all advisory opinions issued before the date of the enactment of this Act as conformed to meet the requirements of section 437f(a), as amended."

§ 437g. Enforcement

(a) (1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred may file a complaint with the Commission. Such complaint shall be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. Any person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code. The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3) (A) Any investigation under paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section of reports and statements filed by any complainant under this title, if such complainant is a candidate.

(B) Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(4) The Commission shall afford any person who receives notice of an alleged violation under paragraph (2), a reasonable opportunity to demonstrate that no action should be taken against such person by the Commission under this Act.

(5) (A) If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall make every endeavor for a period of not less than 30 days to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved, except that, if the Commission has reasonable cause to believe that —

(i) any person has failed to file a report required to be filed under section 434(a)(1)(C) for the calendar quarter occurring immediately before the date of a general election;

(ii) any person has failed to file a report required to be filed no later than 10 days before an election; or

(iii) on the basis of a complaint filed less than 45 days but more than 10 days before an election, any person has committed a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

the Commission shall make every effort, for a period of not less than one-half the number of days between the date upon which the Commission determines there is reasonable cause to believe such a violation has occurred and the date of the election involved, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved. A conciliation agreement, unless violated, shall constitute a complete bar to

any further action by the Commission, including the bringing of a civil proceeding under subparagraph (B).

(B) If the Commission is unable to correct or prevent any such violation by such informal methods, the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order, including a civil penalty which does not exceed the greater of \$5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(C) In any civil action instituted by the Commission under subparagraph (B), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of \$5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(D) If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 441j, or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitation set forth in subparagraph (A).

(6) (A) If the Commission believes that there is clear and convincing proof that a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which shall not exceed the greater of (i) \$10,000; or (ii) an amount equal to 200 percent of the amount of any contribution or expenditure involved in such violation.

(B) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of (i) \$5,000; or (ii) an amount equal to the amount of the contribution or expenditure involved in such violation.

(C) The Commission shall make available to the public (i) the results of any conciliation attempt, including any conciliation agreement entered into by the Commission; and (ii) any determination by the Commission that no violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred.

(7) In any civil action for relief instituted by the Commission under paragraph (5), if the court determines that the Commission has established through clear and convincing proof that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court may impose a civil penalty of not more than the greater of (a) \$10,000; or (b) an amount equal to 200

percent of the contribution or expenditure involved in such violation. In any case in which such person has entered into a conciliation agreement with the Commission under paragraph (5)(A), the Commission may institute a civil action for relief under paragraph (5) if it believes that such person has violated any provision of such conciliation agreement. In order for the Commission to obtain relief in any such civil action, it shall be sufficient for the Commission to establish that such person has violated, in whole or in part, any requirement of such conciliation agreement.

(8) In any action brought under paragraph (5) or paragraph (7), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(9) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made —

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28, United States Code.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(12) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (5) it may petition the court for an order to adjudicate such person in civil contempt, except that if it believes the violation to be knowing and willful it may petition the court for an order to adjudicate such person in criminal contempt.

(b) In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

(c) Any member of the Commission, any employee of the Commission, or any other person who violates the provisions of subsection (a)(3)(B) shall be fined not more than \$2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subsection (a)(3)(B) shall be fined not more than \$5,000.

§ 437h. Judicial review.

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

§ 438. Administrative and judicial provisions

(a) *Duties.* It shall be the duty of the Commission —

(1) *Forms.* To develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this chapter;

(2) *Manual for uniform bookkeeping and reporting methods.* To prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) *Filing, coding, and cross-indexing system.* To develop a filing, coding, and cross-indexing system consonant with the purposes of this chapter;

(4) *Public inspection; copies; sale or use restrictions.* To make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: *Provided*, That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) *Preservation of reports and statements.* To preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(6) *Index of reports and statements; publication in Federal Register.* To compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price; and to compile and maintain a separate cumulative index of reports and statements filed with it by political committees supporting more than one candidate, which shall include a listing of the date of the registration of any such political committee and the date upon which any such political committee qualifies to make expenditures under section 441a(a)(2), and which shall be revised on the same basis and at the same time as the other cumulative indices required under this paragraph.

(7) *Special reports; publication.* To prepare and publish from time to time special reports listing those candidates for whom reports were filed as required by this title and those candidates for whom such reports were not filed as so required;

(8) *Audits; investigations.* To make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this chapter, and with respect to alleged failures to file any report or statement required under the provisions of this chapter, and to give priority to auditing and field investigating of the verification for, and the receipt and use of, any payments received by a candidate under chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

(9) *Enforcement authorities; reports of violations.* To report apparent violations of law to the appropriate law enforcement authorities; and

(10) *Rules and regulations.* To prescribe rules and regulations to carry out the provisions of this chapter, in accordance with the provisions of subsection (c).

(b) *Commission; duties; national clearinghouse for information; studies, scope, publication, copies to general public at cost.* It shall be the duty of the Commission to serve as a national clearinghouse for information in respect to the administration of elections. In carrying out its duties under this subsection, the Commission shall enter into contracts for the purpose of conducting independent studies of the administration of elections. Such studies shall include, but shall not be limited to, studies of —

(1) the method of selection of, and the type of duties assigned to, officials and personnel working on boards of elections;

(2) practices relating to the registration of voters; and

(3) voting and counting methods.

Studies made under this subsection shall be published by the Commission and copies thereof shall be made available to the general public upon the payment of the cost thereof.

(c) Review of regulations.

(1) The Commission, before prescribing any rule or regulation under this section, shall transmit a statement with respect to such rule or regulation to the Senate or the House of Representatives, as the case may be, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If the appropriate body of the Congress which receives a statement from the Commission under this subsection does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. In the case of any rule or regulation proposed to deal with reports or statements required to be filed under this title by a candidate for the office of President of the United States, and by political committees supporting such a candidate both the Senate and the House of Representatives shall have the power to disapprove such proposed rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved under this paragraph.

(3) If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of Senator, and by political committees supporting such candidate, it shall transmit such statement to the Senate. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such candidate, it shall transmit such statement to the House of Representatives. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this title by a candidate for the office of President of the United States, and by political committees supporting such candidate it shall transmit such statement to the House of Representatives and the Senate.

(4) For purposes of this subsection, the term "legislative days" does not include, with respect to statements transmitted to the Senate, any calendar day on which the Senate is not in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is not in session, and with respect to statements transmitted to both such bodies, any calendar day on which both Houses of the Congress are not in session.

(5) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

(d) Rules and regulations; Congressional cooperation.

(1) The Commission shall prescribe suitable rules and regulations to carry out the provisions of this title, including such rules and regulations as may be necessary to require that —

(A) reports and statements required to be filed under this title by a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, and by political committees supporting such candidate, shall be received by the Clerk of the House of Representatives as custodian for the Commission;

(B) reports and statements required to be filed under this title by a candidate for the office of Senator, and by political committees supporting such candidate, shall be received by the Secretary of the Senate as custodian for the Commission; and

(C) the Clerk of the House of Representatives and the Secretary of the Senate, as custodians for the Commission, each shall make the reports and statements received by him available for public inspection and copying in accordance with paragraph (4) of subsection (a), and preserve such reports and statements in accordance with paragraph (5) of subsection (a).

(2) It shall be the duty of the Clerk of the House of Representatives and the Secretary of the Senate to cooperate with the Commission in carrying out its duties under this Act and to furnish such services and facilities as may be required in accordance with this section.

§ 439. Statements filed with State officers

(a) "*Appropriate State*" defined. A copy of each statement required to be filed with the Commission by this chapter shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. For purposes of this subsection, the term "appropriate State" means —

(1) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of President or Vice President of the United States, each State in which an expenditure is made by him or on his behalf, and

(2) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative, or Delegate or Resident Commissioner to, the Congress of the United States, the State in which he seeks election.

(b) *Duties of State officers.* It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a) of this section —

(1) to receive and maintain in an orderly manner all reports and statements required by this chapter to be filed with him;

(2) to preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and

(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

§ 439a. Use of contributed amounts for certain purposes

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal office, may be contributed by him to any organization described in section 170(c) of Title 26 of the U.S. Code, or may be used for any other lawful purpose. To the extent any such contribution, amount contributed, or expenditure thereof is not otherwise required to be disclosed under the provisions of this title, such contribution, amount contributed, or expenditure shall be fully disclosed in accordance with rules promulgated by the Commission. The Commission is authorized to prescribe such rules as may be necessary to carry out the provisions of this section.

§ 439b. Prohibition of franked solicitations

No, Senator, Representative, Resident Commissioner, or Delegate shall make any solicitations of funds by a mailing under the frank under section 3210 of Title 39, United States Code.

§ 439c. Authorization of appropriations

There are authorized to be appropriated to the Commission for the purpose of carrying out its functions under this Act, and under chapters 95 and 96 of Title 26 of the United States Code, not to exceed \$5 million for the fiscal year ending June 30, 1975. There are authorized to be appropriated to the Com-

mission \$6,000,000 for the fiscal year ending June 30, 1976, \$1,500,000 for the period beginning July 1, 1976, and ending September 30, 1976, and \$6,000,000 for the fiscal year ending September 30, 1977.

§ 441a. Limitations on contributions and expenditures¹

(a) *Contributions by persons and committees.*

(1) No person shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

(2) No multicandidate political committee shall make contributions —

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000;

¹ Sec. 440, "Prohibition of Contributions in Name of Another," was stricken from the United States Code by P.L. 93-443. Its provisions are now governed by Sec. 441f.

Sec. 441, "Penalties," was stricken from the United States Code by P.L. 94-283. Its provisions are now governed by Sec. 441j and 437g.

Sections of the United States Code were stricken from Title 18, U.S.C. by P.L. 94-283, and added to title 2, U.S.C. The Title 18 Sections, and their new Title 2 Section numbers, are as follows: 608 - 441a; 610-441b; 611 - 441c; 612 - 441d; 613 - 441e; 614 - 441f; 615 - 441g; 616 - 441i; 617 - 441h. Section 608(a), "Personal funds of candidate and family," was stricken, except as added to title 26, U.S.C. 9004(d), and 9035(a). Section 608(e), "Expenditures relative to clearly identified candidate," was stricken.

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidates, in any calendar year, which, in the aggregate, exceed \$15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

(3) No individual shall make contributions aggregating more than \$25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party.

For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that —

(A) Nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by a State committee of a political party shall not be considered to have been made by a single political committee; and

(C) Nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) the limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection —

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such

candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Limitations on expenditures.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of the Internal Revenue Code of 1954 (relating to condition for eligibility for payments) or under section 9033 of the Internal Revenue Code of 1954 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of —

(A) \$10,000,000, in the case of a campaign for nomination for election to such office except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e)), or \$200,000; or

(B) \$20,000,000, in the case of a campaign for election to such office.

(2) For purposes of this subsection —

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a Vice Presidential candidate, if it is made by —

(i) an authorized committee or any other agent of the candidate for the purpose of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Adjustment of limitations based on price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) and subsection (d) shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1) —

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(d) *Exceptions for national and State committees.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) the national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds —

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of —

(i) two cents multiplied by the voting age population of the State (as certified under subsection (e)); or

(ii) \$20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, \$10,000.

(e) *Voting age population estimates.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each Congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Knowing violations.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) The Commission shall prescribe rules under which any expenditure by a candidate for Presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) Notwithstanding any other provision of this Act, amounts totaling not more than \$17,500 may be contributed to a candidate for nomination for election, or election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

§ 441b. Contributions or expenditures by national banks, corporations or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice

Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section, and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 791(h)), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include —

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful —

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), if shall be unlawful —

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of \$50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately

and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

§ 441c. Contributions by Government contractors

(a) It shall be unlawful for any person —

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material supplies or equipment to the United States or any department or agency thereof or for selling any land or building

to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of —

(A) the completion of performance under; or

(B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings,

directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

(b) This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund section 441b applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) For purposes of this section, the term "labor organization" has the meaning given it by section 441b(b)(1).

§ 441d. Publication or distribution of political statements

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication —

(1) if authorized by a candidate, his authorized political committees or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication has been authorized; or

(2) if not authorized by a candidate, his authorized political committees, or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication is not authorized by any candidate, and state the name of the person who made or financed the expenditure for the communication, including, in the case of a political committee, the name of any affiliated or connected organization required to be disclosed under section 433(b)(2).

441e. Contributions by foreign nationals

(a) It shall be unlawful for a foreign national, directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from any such foreign national.

(b) As used in this section, the term "foreign national" means

(1) a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(b)), except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20)).

§ 441f. Prohibition of contributions in name of another

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

§ 441g. Limitation on contributions of currency

No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed \$100, with respect to any campaign of such candidate for nomination for election, for for election, to Federal office.

§ 441h. Fraudulent misrepresentation of campaign authority

No person who is a candidate for Federal office or an employee or agent of such a candidate shall —

(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing

or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

§ 441i. Acceptance of excessive honorariums

(a) No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept—

(1) any honorarium of more than \$2,000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech, or article; or

(2) honorariums (not prohibited by paragraph (1) of this section) aggregating more than \$25,000 in any calendar year.

(b) * If an honorarium payable to a person is paid instead at his request to a charitable organization selected by payor from a list of 5 or more charitable organizations provided by that person, that person shall not be treated, for purposes of subsection (a), as accepting that honorarium. For purposes of this subsection, the term 'charitable organization' means an organization described in section 170(c) of the Internal Revenue Code of 1954.

(c) * For purposes of determining the aggregate amount of honorariums received by a person during any calendar year, amounts returned to the person paying an honorarium before the close of the calendar year in which it was received shall be disregarded.

(d) * For purposes of paragraph (2) of subsection (a), an honorarium shall be treated as accepted only in the year in which that honorarium is received.

*** EDITORIAL NOTE; NOTICE OF AMENDMENT TO 2 U.S.C. § 441i:** *Section (b), (c) and (d) were added to 2 U.S.C. § 441i by Public Law 95-216 (H.R.-9340) which was signed into law on December 20, 1977. That Act provided that "[these] amendments . . . shall apply with respect to any honorarium received after December 31, 1976."*

§ 441j. Penalty for violations

(a) Any person, following the date of the enactment of this section, who knowingly and willfully commits a violation of any provision or provisions of this Act which involves the making, receiving, or reporting of any contribution or expenditure having a value in the aggregate of \$1,000 or more during a calendar year shall be fined in an amount which does not exceed the greater of \$25,000 or 300 percent of the amount of any contribution or expenditure involved in such violation, imprisoned for not more than one year, or both.

In the case of a knowing and willful violation of section 441b(b)(3), including such a violation of the provisions of such section as applicable through section 441c(b), of section 441f, or of section 441g, the penalties set forth in this section shall apply to a violation involving an amount having a value in the aggregate of \$250 or more during a calendar year.

In the case of a knowing and willful violation of section 441h, the penalties set forth in this section shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of \$1,000 or more is involved.

(b) A defendant in any criminal action brought for the violation of a provision of this Act, or of a provision of chapter 95

or chapter 96 of the Internal Revenue Code of 1954, may introduce as evidence of his lack of knowledge of or intent to commit the offense for which the action was brought a conciliation agreement entered into between the defendant and the Commission under section 437g which specifically deals with the Act or failure to act constituting such offense and which is still in effect.

(c) In any criminal action brought for a violation of a provision of this Act, or of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court before which such action is brought shall take into account, in weighing the seriousness of the offense and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether —

(1) the specific act or failure to act which constitutes the offense for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under section 437g;

(2) the conciliation agreement is in effect; and

(3) the defendant is, with respect to the violation involved in compliance with the conciliation agreement.

Editorial Note; Savings Provision: Section 114 of the "Federal Election Campaign Act Amendments of 1976," P.L. 943-283, contains the following savings provision.

"Except as otherwise provided by this Act, the repeal by this Act of any section or penalty shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such section or penalty, and such section or penalty shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability."

§ 442. Authority to procure technical support and other services and incur travel expenses; payment of such expenses

For the purpose of carrying out his duties under the Federal Election Campaign Act of 1971 [as amended], the Secretary of the Senate is authorized from and after July 1, 1972 —

(1) to procure technical support services,

(2) to procure the temporary or intermittent services of individual technicians, experts, or consultants, or organizations thereof, in the same manner and under the same conditions, to the extent applicable, as a standing committee of the Senate may procure such services under section 72a(i) of this title,

(3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency, and

(4) to incur official expenses.

Payments to carry out the provisions of this paragraph shall be made from funds included in the appropriation "Miscellaneous Items" under the heading "Contingent Expenses of the Senate" upon vouchers approved by the Secretary of the Senate. All sums received by the Secretary under authority of the Federal Election Campaign Act of 1971 [as amended] shall be covered into the Treasury as miscellaneous receipts.

§ 451. Extension of credit by regulated industries; regulations

The Civil Aeronautics Board, the Federal Communications Commission, and the Interstate Commerce Commission shall each promulgate, within 90 days after February 7, 1972, its

own regulations with respect to the extension of credit, without security, by any person regulated by such Board or Commission to any candidate for Federal office, or to any person on behalf of such a candidate, for goods furnished or services rendered in connection with the campaign of such candidate for nomination for election, or election, to such office.

§ 452. Prohibition against use of certain Federal funds for election activities; definitions

No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Office of Economic Opportunity who, in his official capacity as such an officer or employee, engages in any such activity.

§ 453. Effect on State law

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

§ 454. Partial invalidity

If any provision of this title, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the title and the application of such provision to other persons and circumstances shall not be affected thereby.

§ 455. Period of limitations⁴

(a) No person shall be prosecuted, tried, or punished for any violation of title III of this Act, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

(b) Notwithstanding any other provision of law —

(1) the period of limitations referred to in subsection (a) shall apply with respect to violations referred to in such subsection committed before, on, or after the effective date of this section; and

(2) no criminal proceeding shall be instituted against any person for any act or omission which was a violation of any provision of Title III of this Act, as in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974.

Nothing in this subsection shall affect any proceeding pending in any court of the United States on the effective date of this section.

⁴ Sec. 456, "Additional enforcement authority," was stricken from the United States Code by P.L. 94-283.

(14)

No. 85-701

Supreme Court, U.S.
FILED

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

**REPLY BRIEF FOR APPELLANT
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OCTOBER TERM, 1986

No. 85-701

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUITREPLY BRIEF FOR APPELLANT
FEDERAL ELECTION COMMISSION

I. THE COMMISSION AND THE COURT OF APPEALS PROPERLY CONCLUDED THAT MCFL'S EXPENDITURE OF CORPORATE TREASURY FUNDS VIOLATED 2 U.S.C. § 441b

A. MCFL argues (Br. 8-12) that the Commission and the court of appeals erred in construing 2 U.S.C. § 441b to prohibit the use of corporate treasury funds to make expenditures that are not coordinated with a candidate. In making this argument, MCFL has a heavy burden to sustain, for this Court has held that "the Commission is precisely the type of agency" to which deference should be afforded in interpreting the Act. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Thus, the Court is not to "simply impose its own con-

struction on the statute"; instead, "the question for the [C]ourt is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Accord, e.g., *Young v. Community Nutrition Inst.*, 106 S. Ct. 2360, 2364-65 (1986); *Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102, 1108 (1985). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. at 39.

Since it was established in 1975, the Commission has always construed section 441b to apply to independent corporate expenditures like the one in this case. The Commission adopted this view in its first advisory opinion,¹ and the first set of regulations promulgated when the Commission was reconstituted after *Buckley v. Valeo*, 424 U.S. 1 (1976), included a provision "to make clear that corporations and labor organizations may not make independent expenditures on behalf of Federal candidates." *Explanation and Justification of Commission Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. 101 (1977).² These regulations were submitted to Congress pursuant to the Act's legislative veto provision, 2 U.S.C. § 438(d)(1) and, although not dispositive, "Congress' failure to disapprove the regulations . . . strongly im-

¹ Advisory Opinion ("AO") 1975-1, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5103, p. 10,021 n.1, reprinted in 40 Fed. Reg. 29,792 n.1 (1975).

² This regulation, currently codified at 11 C.F.R. § 114.1(a)(1), provides in pertinent part:

The term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, political party or committee, organization, or any other person in connection with any election to any [federal office].

plies that the regulations accurately reflect congressional intent." *Grove City College v. Bell*, 465 U.S. 555, 568 (1984). Accord *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. at 34-35. As we show below, both the language of the Act as interpreted by the courts and the legislative history support the Commission's construction.

1. As the Commission demonstrated in its opening brief, pp. 12-18, this Court itself determined long ago that Congress had broadened the prohibition now contained in 2 U.S.C. § 441b(a) precisely to reach "an expenditure [by a corporation or union] of its own funds to state its position to the world," *United States v. UAW*, 352 U.S. 567, 585 (1957), and that the provision was intended to apply "whether or not said expenditures are with or without the knowledge or consent of the candidates." *Id.* at 582, quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46 (1946). Indeed, this Court reviewed the requirements for a legally sufficient indictment under former 18 U.S.C. § 610 (section 441b's predecessor) in both *United States v. CIO*, 335 U.S. 106 (1948) and *United States v. UAW*, 352 U.S. 567 (1957), and did not include coordination with a candidate as a requisite element. See also *United States v. Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966). To the contrary, the Court specified that "[t]he evil at which Congress has struck" in this provision "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *United States v. UAW*, 352 U.S. at 589. That is just what MCFL did in this case.

MCFL does not seriously challenge this Court's conclusion that independent corporate expenditures were prohibited by the 1947 amendments. Rather, MCFL's argument (Br. 10-12) is that in 1971 Congress narrowed the definition of expenditure in order to remove from the statute's prohibition expenditures of corporate and union treasury funds that are not coordinated with a candidate.

Only last year this Court rejected the argument that when this same 1971 Congress prohibited certain "expenditures" by political committees in excess of \$1,000 in 26 U.S.C. § 9012(f), it only intended to reach expenditures that were coordinated with a candidate. *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459, 1466-67 (1985). The Court found no support for such a construction in the legislative history and noted that since coordinated expenditures are deemed contributions under the Act such a construction would render the prohibition of "expenditures" superfluous. Accordingly, the Court concluded that the "independent expenditures at issue in this case are squarely prohibited by § 9012(f)." *Id.* MCFL makes no attempt to reconcile its assertion that the 1971 Congress acted to eliminate the longstanding prohibition on independent expenditures by corporations and unions in 18 U.S.C. § 610 with this Court's conclusion that Congress was simultaneously enacting a new prohibition on independent expenditures by political committees in 26 U.S.C. § 9012(f).

MCFL bases its argument upon a parsing of certain words in the complex 1971 amendment to former 18 U.S.C. § 610. As demonstrated in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 430-31 (1972), the primary purpose of that amendment, as the legislative debates made clear, was expressly to exempt from the statutory prohibition the internal political communications of corporations and unions which this Court had previously found to be beyond the statute's intended reach, while retaining the prohibition on expenditure of corporate and union funds to influence the public on federal elections. Thus, the heart of the amendment was the new language permitting corporations and unions to spend money freely to communicate with stockholders and members "on any subject," and to use treasury funds to administer a separate segregated political fund made up of voluntary contributions from stockholders and members.

Ignoring the purpose of the legislation, MCFL seizes upon the wording of a description of contributions and expenditures in the amendment which stated that "[f]or the purposes of this section . . . the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election" for federal office. 2 U.S.C. § 441b(b)(2) (emphasis added). Reading these words in isolation from their context in the comprehensive Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), MCFL argues that the second emphasized phrase should be interpreted as a limitation of the scope of the provision to expenditures made in cooperation with a candidate or political committee.³ This Court has admonished that such "insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 417 n.7 (1960). See also *Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981).

MCFL's exclusive focus upon the words of the 1971 amendment to section 610 ignores the fact that in this same bill Congress enacted another, broader definition of "expenditure," codified at former 18 U.S.C. § 591(f). That definition contained no arguably limiting language, and expressly provided that the broader definition was also applicable to section 610.⁴ The courts construed these

³ MCFL offers no explanation why Congress did not adopt language clearly referring to coordination with a candidate, as it has done in 2 U.S.C. §§ 431(17), 441a(a)(7)(B)(i).

⁴ Former 18 U.S.C. § 591(f) provided (emphasis added):

When used in sections 597, 599, 600, 602, 608, 610, and 611 of this title—

(f) "expenditure" means—

(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made

two provisions as providing supplementary definitions of expenditure for the purposes of section 610. *Ash v. Cort*, 496 F.2d 416, 424 (3rd Cir. 1974), *reversed on other grounds*, 422 U.S. 66 (1975); *United States v. Chestnut*, 394 F. Supp. 581, 585, 591 (S.D.N.Y. 1975), *affirmed*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). As the Third Circuit explained:

The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971 The drafters clearly intended § 591's definition to affect interpretation of § 610, for they provided that the definitions in § 591 applied to use of those terms in § 610. We note also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition.

Ash v. Cort, 496 F.2d at 424-25. As noted *supra*, p. 2, the Commission expressly adopted this construction of the statute in its first advisory opinion, and then promulgated a regulation, based upon the combined effect of the two definitions, which it has followed ever since.

for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) a transfer of funds between political committees. . . .

Pub. L. No. 92-225, 86 Stat. 8-9 (1972).

This analysis of the language of the 1971 Act as a whole is supported by the recognized canons of statutory construction, and is entitled to deference under the principles discussed on pp. 1-2, *supra*. As fully discussed by the court below (J.S. App. 8a), it has long been recognized that Congress' use of the term "includes," as it did in the language relied upon by MCFL, does not evidence an intention to restrict the provision's reach, particularly when Congress defines what other terms in the statute shall "mean," as it did with the other definitions in section 441b.⁵ See, e.g., *Herb's Welding, Inc. v. Gray*, 105 S. Ct. 1421, 1427 (1985); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *United States v. Massachusetts Bay Transp. Authority*, 614 F.2d 27, 28 (1st Cir. 1980). The principle that statutes should be construed to give effect to all the words enacted by Congress, relied upon by MCFL (Br. 11-12), also supports the Commission's construction. If the description of what expenditure "shall include" added to section 610 in 1971 were an exclusive definition, the explicit language Congress added to section 591 in 1971 making that section's definition of what expenditure "means" applicable to section 610, would be nullified.⁶

⁵ See, e.g., 2 U.S.C. §§ 441b(b)(1), 441b(b)(7).

⁶ In 1974, Congress added a number of new exceptions to the general definition of "expenditure" in 18 U.S.C. § 591. See Pub. L. No. 93-443, 88 Stat. 1263, 1270-71 (1974). It also clarified that the general definition was not to override the specific exclusions from that term that had been incorporated into 18 U.S.C. § 610 in 1971, by specifying that the general definitions in section 591 were applicable, *inter alia*, to section 610 "[e]xcept as otherwise specifically provided." 88 Stat. 1268. At the same time, a similar provision was added to the definition of expenditure in the FECA, which is now codified at 2 U.S.C. § 431(9)(B)(v). See 88 Stat. 1274. It is clear that this alteration was not intended to render the section 431(9) definition of expenditure inapplicable to section 441b, as MCFL asserts (Br. 10), for in 1976, when Congress moved the prohibition from the criminal code to Title 2, the conference

Finally, the Commission's construction is supported by the structure of the Act, for several exemptions incorporated only into the definition of expenditure in section 431 would make little sense if they did not apply to section 441b as well. First, even MCFL agrees (Br. 18-23) that the media exception now codified at 2 U.S.C. § 431 (9) (B) (i) was intended to protect press functions from the prohibition in section 441b. Similarly, although a corporation's communication with its members is exempted from the general definition of expenditures, 2 U.S.C. § 431 (9) (B) (iii), there is no such exemption from the definition in section 441b. MCFL's construction would make these special protections for certain corporate activities inapplicable to section 441b, a senseless result that is impossible to accept. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).⁷

2. MCFL's argument for narrowing the reach of section 441b almost completely ignores the extensive legislative history of that statute. However, in construing a

report expressly noted that in some respects these two definitions "overlap" and "should be read together." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63 (1976), reprinted in *FEC, Legislative History of the Federal Election Campaign Act Amendments of 1976*, at 1057 (1977) (hereafter "1976 Leg. Hist."). This intention is confirmed by Congress' failure to veto the regulations discussed on pp. 2-3, *supra*, or to alter the Commission's construction of section 441b when it revised the Act in 1979.

⁷ Even if 2 U.S.C. § 441b(b) (2) were the exclusive definition of "expenditure," however, its terms would not exempt from section 441b a corporation's expenditures to express its own views on candidates to the public. Section 441b(b) (2) is not limited to payments made directly to a candidate, but includes as well any "indirect" payment or gift of "anything of value." As shown *infra*, p. 10, Rep. Hansen's amendment was drafted to codify previous court decisions, and this Court had found in *United States v. UAW*, 352 U.S. at 585 (emphasis added) that the statute "embrace[d] precisely the kind of indirect contribution alleged in the indictment" in that case, which did not allege a coordinated expenditure.

statute, "a page of history is worth a volume of logic,"⁸ and the legislative history of section 441b firmly supports the Commission's application of the statute to independent corporate expenditures like MCFL's.

As noted on p. 15 of our opening brief, the prohibition on contributions was extended to cover expenditures in 1947 because several congressional committees had discovered that labor organizations had evaded the contribution limits by conducting extensive campaigns on their own behalf in support of favored candidates. The impact of this change in the law was debated in depth in the Senate, during which Senator Taft, the manager of the bill, consistently affirmed that expenditures would be prohibited whether or not made in coordination with a candidate.⁹ As noted *supra*, p. 3, in *United States v.*

⁸ *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S. Ct. 1931, 1935 (1986), quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

⁹ For example, the following colloquy between Senators Pepper and Taft clearly anticipated what MCFL did here:

Mr. PEPPER Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the Presidency next year, and in opposition to the Senator from Ohio, if he should be the Republican nominee for the Presidency, stating that President Truman was a friend of labor and that the Senator from Ohio was not friendly to labor? Would that be called a political expenditure on the part of the labor organization?

Mr. TAFT. If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using its stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another The prohibition is against a labor organization using its funds either as a contribution to a political campaign or as a direct expenditure of funds on its own behalf.

93 Cong. Rec. 6436 (1947) (emphasis added), reprinted in II NLRB, *Legislative History of the Labor Management Relations*

UAW, 352 U.S. 567 (1957), this Court relied upon this legislative history to uphold an indictment that did not allege that the union's expenditure had been coordinated with any candidate.

The 1971 amendments to 18 U.S.C. § 610, upon which MCFL relies, were proposed on the floor of the House by Rep. Orval Hansen. As we have shown (FEC Br. 22-23), the policy Rep. Hansen said his amendment was intended to implement was to permit internal communications of corporations and unions while continuing to prohibit the use of corporate and union money to influence the public in the selection of candidates for federal office.

If Rep. Hansen's amendment had also been intended to effect the dramatic change in policy alleged by MCFL—removing from the statute's reach an entire class of expenditures specifically targeted by Senator Taft and overruling this Court's construction of the Act in the *UAW* case—one would expect to find some indication of this intent in the legislative history. See, e.g., *National Treasury Employees Union v. FLRA*, No. 85-1053, slip op. at 13 (D.C. Cir. Sept. 2, 1986). Rep. Hansen, however, went to great lengths to reassure his colleagues that his amendment would not make any significant changes, but would merely "codify the court decisions interpreting section 610 of title 18 of the United States Code." 117 Cong. Rec. 43,379 (1971), reprinted in *FEC, Legislative History of the Federal Election Campaign Act of 1971*, at 757 (1981) (hereafter "*1971 Leg. Hist.*"). See also 117 Cong. Rec. 41,869 (1971). Rep. Hansen went on to emphasize that under his amendment section 610 was "plainly all-encompassing" and commented:

Act, 1947, at 1526-27 (1948) (hereafter "*1947 Leg. Hist.*"). Similar statements were repeated throughout the legislative history of the Taft-Hartley amendments. See, e.g., 93 Cong. Rec. 6437, 6438, 6439, 6440, *1947 Leg. Hist.* at 1528-35 (remarks of Sens. Pepper, Taft and Magnuson).

That is as it should be. For as I noted at the outset the basic purpose of section 610 is to prohibit active electioneering by corporations and unions for Federal candidates directed at the public at large. There can be no doubt that this language accomplishes that end.

[I]t should be noted that this prohibition is the most far-reaching in the entire election law. . . .

117 Cong. Rec. 43,380, *1971 Leg. Hist.* at 758. Rep. Hays, chairman of the House Committee which had reported the bill under debate, agreed that Rep. Hansen's amendment "is substantially what is in the law now. Everybody has lived with it for a long time. I intend to support the amendment." 117 Cong. Rec. 43,381, *1971 Leg. Hist.* at 759. Finally, during the debate on the conference committee's report, Rep. Hansen reiterated that his amendment would not alter the effect of the law as it had originally been conceived by Senator Taft and construed by this Court.

I will repeat what I stated several times during the course of the debate that the purpose and effect of my amendment is to codify and clarify the existing law and not to make any substantive changes in the law.

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The Hansen amendment is consistent with the legislative intent expressed by the original author of section 610, the late Senator Robert Taft of Ohio.

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Thus the Hansen amendment does not break new ground, it merely writes currently accepted practices into clear and explicit statutory language.

118 Cong. Rec. 328-29 (1972), *1971 Leg. Hist.* at 896-97. In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. at 399, 427, this Court agreed that, with one

possible exception, the Hansen amendment "merely codifies prior law."¹⁰

In sum, Congress had no intention of removing uncoordinated expenditures from the reach of section 610 when it adopted the Hansen amendment in 1971. Congress' intent in that amendment was to permit election advocacy to be distributed freely to a corporation's or union's own stockholders or members, but to continue to prohibit distributing such material to the public, as MCFL did, unless it was financed through a separate segregated fund. Accordingly, even if MCFL had been right in its assertion that the 1971 language literally indicated a contrary result, the Commission's construction of the Act would still be entitled to affirmance. *See, e.g., Watt v. Alaska*, 451 U.S. at 266.

B. MCFL argues (Br. 13-17) that if section 441b applies to corporate and union independent expenditures, it can only reach expenditures to expressly advocate the election or defeat of clearly identified federal candidates.¹¹ MCFL points to no statutory language to bolster this assertion, relying instead upon isolated phrases of legislative history divorced from their context.¹² In fact, al-

¹⁰ The one respect in which the Court found the amendment had apparently changed the law was in permitting corporations and unions to use their treasury funds to pay for the administration and solicitation of contributions to a separate segregated fund. *Pipefitters v. United States*, 407 U.S. at 428-32.

¹¹ This is essentially the definition of "independent expenditure" in 2 U.S.C. § 431(17). This provision was added to the Act in 1976 in response to this Court's construction of a different section of the Act in *Buckley v. Valeo*, 424 U.S. at 44 n.52, to apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

¹² MCFL blatantly misrepresents the legislative history when it quotes from a 1974 House report that was not even discussing 18 U.S.C. § 610, and relies upon it (Br. 14) as "the House Report" on the 1971 amendment to section 610.

though Congress has expressly limited other provisions in the Act to communications containing "express advocacy,"¹³ it has never altered section 441b's statement that it applies to all expenditures that are "in connection with" a federal election. This striking difference in statutory language cannot be presumed to be accidental. *Russello v. United States*, 464 U.S. 16, 23 (1983).

The statute's structure and legislative history confirm that section 441b was not intended to be limited to expenditures for express advocacy.¹⁴ In particular, the 1947 debate over extending the statutory prohibition to cover "expenditures" clearly indicates that use of candidates' positions on issues in a partisan election distribution was intended to be prohibited. Indeed, Senator Taft expressly addressed the question:

Mr. PEPPER. I wish to ask the Senator from Ohio whether he agrees . . . that if a labor organization used its funds to disseminate the voting record of a candidate for office, during the time of the campaign, that would not be unlawful. . . .

Mr. TAFT. I think it would depend upon all the circumstances in the case. If it was merely a bare statement of actual facts and simply direct quotations of what the man had said in the course of certain speeches on certain subjects, and was not colored in any way, I would rather agree But I think it would depend, in each case, on the character of the publication.

¹³ 2 U.S.C. §§ 431(9)(B)(iii), 431(17), 441d(a).

¹⁴ The plain language of section 441b establishes, for example, that a corporation's partisan get-out-the-vote campaign limited to members of the public listed as registered with one party, would be a prohibited corporate expenditure regardless of whether any candidate's election or defeat is expressly advocated in the process. *See* 2 U.S.C. §§ 441b(b)(2)(B), 431(9)(B)(ii). *See also* 117 Cong. Rec. 43,380-381, 1971 Leg. Hist. at 758-59 (remarks of Rep. Hansen); 117 Cong. Rec. 43,382, 1971 Leg. Hist. at 760 (colloquy between Reps. Anderson and Hansen).

93 Cong. Rec. 6447, 1947 Leg. Hist. at 1548. See also 93 Cong. Rec. 6447, 1947 Leg. Hist. at 1546 (colloquy between Sens. Taft and Ball). This distinction was adopted by the courts¹⁵ and has been incorporated into the Commission's regulations, 11 C.F.R. § 114.4(b)(4) and (5).¹⁶ Even MCFL has not been able to mount a serious argument that its special election leaflet satisfies this test, and it has identified nothing in the statute or legislative history that would suffice, under the principles

¹⁵ *United States v. Lewis Food Co.*, 366 F.2d at 712 ("The 'Notice to Voters' also makes it plain that, in Lewis' opinion, those office holders given low ratings on their votes 'in favor of constitutional principles' should not be re-elected."). See also *United States v. UAW*, 352 U.S. at 592 (distinguishing between "active electioneering" and merely "stat[ing] the record of particular candidates on economic issues").

¹⁶ MCFL argues (Br. 15 n.10) that the Commission's view of section 441b's application to distribution of candidate positions on issues has been "woefully inconsistent" and that "this case is a hangover from earlier [more restrictive] views." The facts discussed in the text, however, establish that MCFL's distribution in this case would be unlawful under the Commission's current regulations as well as its earlier advisory opinions. Thus, even if there had been earlier inconsistencies in the Commission's application of the Act in other circumstances, they would make no difference on the facts of this case.

In any event, the Commission's treatment of this issue has not been marked by any erratic changes that could fairly be characterized, as MCFL does, as "inconsistent" or "flip-flop[s]." The Commission grappled with several factual scenarios implicating the problem of corporate distribution of candidate positions on issues in early advisory opinions adopted by divided votes. See AO 1978-18, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5305 (April 4, 1978); AO 1979-48, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5435 (Oct. 31, 1979); AO 1980-20, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5487 (May 1, 1980). This experience led the Commission to hold hearings and adopt formal rules, now contained in 11 C.F.R. § 114.4(b)(4) and (5), to delineate factors which determine whether a corporate or union distribution to the public is nonpartisan. These regulations are responsive to the concerns underlying section 441b, and would clearly not permit corporate money to be used for a partisan distribution to the public like MCFL's.

discussed on pp. 1-2, *supra*, to overcome a Commission construction of the Act that implements the intent stated in the legislative history.

As the court of appeals concluded (J.S. App. 16a), however, this case does not require the Court to decide what expenditures are "in connection with" a federal election under section 441b, even though not for express advocacy. MCFL's special election flyers clearly did contain express advocacy of the election or defeat of specified candidates; therefore, the expenditure in this case would be unlawful even under MCFL's own construction of section 441b.¹⁷ MCFL's flyers did not merely inform readers of candidates' positions on issues. Rather, they went on to identify by name which candidates in each electoral contest MCFL considered to be "pro-life" and to urge the reader to vote for pro-life candidates in language that could not have been more explicit. Thus, under the large print heading "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," the flyers stated:

As you read this edition, you will see that the final election or defeat of pro-life candidates in November will *really* be determined by the outcome of the September 19th primary. No pro-life candidate can

¹⁷ Since MCFL apparently concedes that section 441b reaches expenditures for express advocacy it cannot rely upon its unexplained assertion (Br. 23 n.19) that section 441b is unconstitutionally vague in defining which expenditures are prohibited. Although the "statute may leave room for uncertainty at the periphery," MCFL's corporate expenditure for express advocacy would be unlawful "under any reasonable interpretation of the statute." *FEC v. National Right to Work Committee*, 459 U.S. 197, 211 (1982). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). Any further uncertainty about the statute's reach can be resolved by obtaining an advisory opinion from the Commission under 2 U.S.C. § 437f. See *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).

win in November without *your vote* in September . . . Thus, *your vote in the primary will make the critical difference in electing pro-life candidates.*

(R., Vol. I, Pl. 16, Ex. A, p. 1, first emphasis original, second emphasis added).¹⁸ That the flyer advocated the election of a category of candidates does not make it any less express, for it carefully listed the name of each candidate in each election who was in the category of "pro-life" candidates for whom the reader was to vote. This is not materially different from a television commercial sponsored by the AFL-CIO urging the viewer to "vote pro-labor" and identifying by name which candidates have supported the union position and which have not, or a flyer urging the reader to "vote for liberals" which specifies which candidates in each electoral race have supported the liberal position and which have not. Such communications could also be said to have "an educational purpose" to "inform readers about the records and positions of all candidates on critical . . . issues" (MCFL Br. 15), and to promote a particular issue as the touchstone for voting decisions (MCFL Br. 16). But like MCFL's flyer, these hypothetical communications go beyond these limited purposes to expressly advocate the election or defeat of candidates identified by name. This Court has never suggested that a communication could be insulated from the Act by including other information along with the express advocacy of a particular election result,¹⁹ and it is clear that if communications of this

¹⁸ This language materially distinguishes this case from *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (en banc), upon which MCFL relies (Br. 17), for that court found a leaflet contained no express advocacy because "no mention is made of any particular federal election, the political affiliation of any congressman, the fact that he is or is not a candidate for elective office, or the name of any electoral opponent of any congressman." *Id.* at 49.

¹⁹ In 2 U.S.C. § 431(9)(B)(iii), Congress has required corporations and unions to report expenses in excess of \$2000 for express

sort were excluded from section 441b there would be little left subject to its provisions.²⁰

C. MCFL has argued (Br. 18-23) that the MCFL newsletters were periodical publications exempt from the definition of expenditure under 2 U.S.C. § 431(9)(B)(i), and that the Special Election Editions at issue here were also exempt because they were merely issues of that newsletter.²¹ As the court of appeals found (J.S. App. 18a),

advocacy directed to members and stockholders, but explicitly excluded "a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate." See *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979). Congress' failure to add such an exception to section 441b clearly indicates that section 441b was meant to cover such communications. See *Russello v. United States*, 464 U.S. at 23-24.

²⁰ MCFL has submitted to this Court in its supplemental appendix a number of publications of other organizations to show that prohibiting dissemination of congressional voting records would have broad effect. Several amici make the same argument, asserting that they also distribute candidate voting records. However, as discussed above, the Act permits a corporation or union to distribute any communication to its stockholders or members. 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(2)(A); 11 C.F.R. § 114.3. Thus, any of these groups—including MCFL—can distribute election advocacy to their own members without running afoul of the Act. Moreover, the Commission has, as we have shown *supra*, p. 14 n.16, construed the Act to permit corporations to spend corporate funds to distribute candidates' positions on issues to the public as well, so long as they are presented in the nonpartisan manner described in 11 C.F.R. § 114.4(b)(4) and (5), as amici indicate they would. See Chamber of Commerce Brief at 5, 14 n.8; American Civil Liberties Union Brief at 3 n.1. Finally, it is clear, at a minimum, that none of the publications submitted by MCFL or described by the amici contain anything approaching the explicit advocacy of an election result that was distributed to the public by MCFL. Thus, none of those publications could be affected by affirming the application of section 441b to this case.

²¹ Of course, this argument is inconsistent with MCFL's argument that section 431(9) is entirely inapplicable to section 441b. See p. 8, *supra*.

however, even if MCFL's regular newsletter were within the newsmedia exemption, the Special Election Edition would still constitute a prohibited election expenditure since it was distributed free and unrequested to tens of thousands of members of the general public who had never received MCFL's regular newsletter. See FEC Br. at 4.²²

The media exemption was added to the Act in 1974 with little controversy or discussion. The House Report stated that it was one of several new amendments intended "to exempt certain limited activities" from the Act's contribution and spending limits and reporting requirements. H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 4 (1974), reprinted in FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1974*, at 638 (1977) (hereafter "1974 Leg. Hist."). Rather than breaking new ground, these amendments were only intended to "reaffirm the principles stated in the amend-

²² Although it is unnecessary in this case to determine whether MCFL's regular newsletter is a "periodical publication" protected by 2 U.S.C. § 431(9)(B)(i), the Commission has construed this term to mean "a publication in bound pamphlet form appearing at regular intervals . . . containing articles of news, information, opinion or entertainment, whether of general or specialized interest which ordinarily derive their revenues from subscriptions and advertising." AO 1980-109, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5556 (Oct. 6, 1980), quoting *Explanation and Justification of Regulations on Funding of Federal Candidate Debates*, 44 Fed. Reg. 76,735 (1979). MCFL's newsletter does not appear at regular intervals (J.A. 23), and does not derive any revenues from subscriptions or advertising, but is published with corporate funds and distributed free of charge (J.A. 19, 24, 26). The Commission's construction is consistent with the legislative history discussed *infra*, pp. 19-20, and the judicial deference to which it is entitled (pp. 1-2, *supra*) cannot be overcome by the cases relied upon by MCFL (Br. 22, n.18) interpreting similar terms in unrelated statutes. See *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 221 n.31 (D.C. Cir. 1986); *SEC v. Suter*, 732 F.2d 1294, 1298 (7th Cir. 1984).

ment to section 610 . . . proposed by Representative Orval Hansen, and passed by the Congress as part of the Act." *Id.* The particular purpose of the media exemption was to "assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." *Id.* Rep. Frenzel, in his separate views attached to the House Report, agreed that this amendment was "non-controversial" and "basically in conformity with the law already." *Id.* at 144, 1974 Leg. Hist. at 778.²³

The existing law on the applicability of 18 U.S.C. § 610 to media expenditures originated in Senator Taft's explanation during the Senate debates on the 1947 amendments. Senator Taft clearly drew the line between permitted press activities and prohibited corporate and union expenditures.

MR. TAFT. I would say the word "expenditure" (sic) does not mean the sale of newspaper (sic) for money for their worth. If they are sold to subscribers and if the newspaper is supported by subscriptions, then I would not say that constituted such an expenditure. But if the newspapers were given away—even an ordinary newspaper—I think that would violate the Corrupt Practices Act. That act would be violated, it seems to me, if such a news-

²³ MCFL's quotation (Br. 21) from the 1974 committee report, indicating Congress' general intent in all of these new provisions not to "burden" the freedoms of the press or of association," H.R. Rep. No. 1239 at 4, 1974 Leg. Hist. at 638, does not establish that the media exemption entirely immunizes the media from the Act, for the first amendment is not violated by applying laws of general applicability to media corporations. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972). The actual intent of this general statement is clearly not as broad as MCFL believes, for the same committee report only two pages later (H.R. Rep. No. 1239 at 6-7) asserted that first amendment freedoms would not be infringed by a broad limitation on independent expenditures by individuals, which this Court found unconstitutional in *Buckley v. Valeo*, 424 U.S. at 39-59.

paper were given away as a political document in favor of a certain candidate. I think that would have been so under the present law, and I think we make it more clearly so, perhaps, by this measure.

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Mr. TAFT. . . . If the newspaper is prepared and distributed and circulated by means of the expenditure of union funds, then how could a line be drawn between that and political literature or pamphlets or publications of that nature? It is perfectly easy for a labor union to publish lawfully a bona fide newspaper and to charge subscriptions for that newspaper, either by itself or as a corporation.

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Mr. TAFT. I think if the paper is, so to speak, a going concern, it can take whatever position it wants to.

93 Cong. Rec. 6437-38, 1947 Leg. Hist. at 1529-30.

In *United States v. CIO*, 335 U.S. 106 (1948), it was alleged that election advocacy was contained in an issue of a weekly periodical called "The CIO News" which was "distributed in regular course to members or purchasers." 335 U.S. at 111-112. The Court found this distribution to be permissible under the statute on the basis of the legislative history discussed above, but the Court carefully specified that it did not construe the indictment to allege that the CIO had "circulat[ed] free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of 'The CIO News,' as members of the union." *Id.* at 111. See also *id.* at 112 ("[N]o allegation has been made of expenditures for 'free' distribution of the paper to those not regularly entitled to receive it"). The Court emphasized that this distinction was crucial to its decision.

It is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 and

quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden.

Id. at 122-23. Concluding that the particular distribution alleged was permissible under the Act, the Court cautioned that "[w]e express no opinion as to the scope of this section where different circumstances exist." *Id.* at 124.

Although it concedes (Br. 20) that this Court's *CIO* decision was the progenitor of the newsmedia exemption, MCFL's discussion of that case ignores the distinction the Court went to such lengths to emphasize.²⁴ Unlike the *CIO*, MCFL did distribute its election flyers free of charge to thousands of people who were not members of the corporation and had never received MCFL's newsletters. This sort of active electioneering among the public is precisely what section 441b was intended to prohibit.²⁵

²⁴ This Court has twice reaffirmed the fundamental distinction drawn in the *CIO* decision. In *United States v. UAW*, 352 U.S. at 589, the Court found valid an indictment for a union's expenditure for a public broadcast advocating the election of a federal candidate, and observed:

[U]nlike the union-sponsored political broadcast alleged in this case, the communication for which the defendants were indicted in *C.I.O.* was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck in § 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party.

In 1972, only two years before the media exemption was enacted, the Court reiterated that the basis for its decision in *CIO* was that unions were not barred "from using union funds to publish a periodical [containing election advocacy], in regular course and for distribution to those accustomed to receiving it." *Pipefitters v. United States*, 407 U.S. at 417 n.29 (emphasis added).

²⁵ [I]n exempting the "distribu[tion]" of news or commentary "through the facilities of any broadcasting station, newspaper,

Finally, MCFL's argument again conflicts with the structure of the Act. In 2 U.S.C. § 431(9)(B)(iii), Congress exempted from the general definition of expenditure a corporation's or union's communications with its members, but required that such organizations report the costs exceeding \$2000 for communications to their members primarily devoted to express advocacy. This provision was aimed, in part, at special election editions of corporate and union house organs. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 42 (1976); 1976 Leg. Hist. at 1036. MCFL's construction of the media exemption would mean that a corporation or union would have to report its expenses if it distributed a special election edition of its house newsletter only to its members, but if it distributed the election edition to the public as well section 431(9)(B)(iii) would make it exempt from reporting the expenses of the distribution. Such anomalous

magazine or other periodical publication . . .", the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. It would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function. If, for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers, this activity would not come within the press exemption—even though it might comply with a technical reading of the statutory exemption, being a "news story . . . distributed through the facilities of . . . [a] newspaper."

Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). Since the media exemption would not protect *any* corporation or union that engaged in the activity MCFL is charged with—free and unrequested distribution of an election flyer to members of the public who never received MCFL's regular newsletter—there is no basis for MCFL's argument (Br. 46-48) that the application of the Act in this case denies it equal protection of the law.

results could not have been intended by Congress. See p. 8, *supra*.

II. SECTION 441b DOES NOT INFRINGE THE RIGHTS OF CORPORATIONS AND UNIONS TO ENGAGE IN POLITICAL SPEECH

MCFL continues to base its constitutional argument upon the false assumption that section 441b is an outright prohibition of corporate and union political speech, insisting that the statute's express authorization of corporate and union expenditures through a separate segregated fund, added to the statute in 1971, is of no significance.²⁶ However, this Court's recent decisions in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), clearly demonstrate that Congress' provision of an alternative method of financing unlimited corporate and union election speech directed at the public eliminates any basis for finding that the statute significantly abridges first amendment activities.²⁷

In both *Regan* and *League of Women Voters* this Court reviewed statutes making it illegal for certain organizations receiving direct or indirect government subsidies to engage in certain kinds of speech.²⁸ In both cases, the

²⁶ Thus, MCFL asserts (Br. 23 n.20) that five justices of this Court have expressed the opinion that section 441b's predecessor was unconstitutional. All of those separate opinions were issued prior to the 1971 amendment permitting corporations to communicate with the public through separate segregated funds, and all were based upon a construction of the statute that would not have permitted them to do so.

²⁷ Of course, the Act specifically permits unlimited corporate and union communication with their own members. 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(2)(A).

²⁸ In *Regan*, most corporations exempt from taxation under 26 U.S.C. § 501(c)(3) were prohibited from engaging in lobbying; in *League of Women Voters*, publicly subsidized broadcasting stations were prohibited from editorializing.

government argued that the restriction was supported by the government's interest in not paying for the speech of the subsidized organizations, yet the Court upheld the statute in *Regan* on the basis of this interest while striking down the statute in *League of Women Voters*. The crucial difference between the two cases was spelled out in *FCC v. League of Women Voters*, 468 U.S. at 399-400—the statute in *Regan* permitted tax exempt corporations to establish unsubsidized affiliated organizations which could carry on lobbying activities, while the statute in *League of Women Voters* provided no such alternative method of financing public broadcasting stations' editorials. The Court found that “[g]iven that statutory alternative . . . ‘Congress has not infringed any First Amendment rights or regulated any First Amendment activity,’” and acknowledged that if that sort of alternative had been included in the statute in *League of Women Voters*, “such a statutory mechanism would plainly be valid.” *Id.* at 400, quoting *Regan v. Taxation With Representation*, 461 U.S. at 546.

Although it serves different purposes, the statutory mechanism in section 441b is in all material respects indistinguishable from the one upheld in *Regan*.²⁹ As dis-

²⁹ *Regan* cannot be distinguished from this case by arguing that the government's interest in not subsidizing private speech is more compelling than the purposes this Court has found to support section 441b. Since the statute in *League of Women Voters* was invalidated while the one in *Regan* was upheld, this common purpose of the two statutes was clearly not found to outweigh the first amendment interests asserted. The crucial factor was that the statutory mechanism in *Regan*, like the one here, did not actually restrict speech, while the statute in *League of Women Voters*, like the actual limits on election expenditures at issue in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459 (1985), did. *Regan* also cannot be dismissed, as MCFL apparently attempts to do (Br. 27), as involving a “time, place and manner” restriction different in kind from section 441b. Like section 441b, the statute in *Regan* entirely prohibited covered corporations from engaging in a category of speech, except through

cussed in our opening brief, pp. 20-22, a separate segregated fund is essentially nothing more than a separate bank account containing voluntary contributions for political purposes; the corporation or union can completely control the activities of its separate segregated fund, and is free to use the separate segregated fund to express the electoral views of the corporation or union. *Cf. Regan v. Taxation With Representation*, 461 U.S. at 553-54 (Blackmun, J., concurring). Indeed, section 441b would have permitted MCFL to produce and distribute the same election flyer to the same people as it did in this case, if it had only been financed from a wholly controlled separate segregated fund. Accordingly, as in *Regan*, “Congress has not infringed any First Amendment rights or regulated any First Amendment activity” in section 441b. *See also, e.g., United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116, 1123 (8th Cir.) (Van Oosterhout, C.J., joined by Blackmun, J.) (“Separate voluntary political associations by union members are not in any way proscribed by the statute. Therefore, § 610 is not unconstitutional under the First Amendment.”), *adhered to en banc*, 434 F.2d 1127 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385 (1972); *United States v. Chestnut*, 394 F. Supp. at 591 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40, 50-51 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).³⁰

an affiliated entity. Thus if, as MCFL implies, the statute in *Regan* was not subject to strict scrutiny because it did not actually limit speech, the same standard of review is appropriate here.

³⁰ Contrary to MCFL's assertion (Br. 23), both this Court and the lower courts have upheld the constitutionality of section 441b and its predecessors against a number of first amendment attacks. *See, in addition to the cases cited in the text, FEC v. National Right to Work Committee*, 459 U.S. at 206-211; *Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (*en banc*) (answering in the negative questions listed at 689 F.2d 1006, 1015-

At bottom, what this Court has sought to protect in its cases striking down actual limits on independent political expenditures by groups is the ability of "large numbers of individuals of modest means [to] join together in organizations which serve to 'amplif[y] the voice of their adherents.'" *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1467, citing *Buckley v. Valeo*, 424 U.S. at 22; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-96 (1981). In contrast to the statutes in those cases, section 441b clearly does not infringe this important interest because it permits a corporation or union to sponsor a separate segregated fund through which its constituents can join together to amplify their voices.³¹ MCFL's complaint (Br. 28) that

1016 (1982), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984); *California Medical Ass'n v. FEC*, 453 U.S. 182, 193-201 (1981); *International Ass'n of Machinists v. FEC*, 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), *aff'd mem.*, 459 U.S. 983 (1982); *Bread Political Action Committee v. FEC*, 635 F.2d 621, 626-33 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982); *FEC v. National Education Ass'n*, 457 F. Supp. 1102, 1109 (D.D.C. 1978); *FEC v. Weinstein*, 462 F. Supp. 243, 246-49 (S.D.N.Y. 1978); *United States v. Clifford*, 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976); *United States v. United States Brewers' Ass'n*, 239 F. 163 (W.D.Pa. 1916).

³¹ In fact, the Act permits corporate separate segregated funds to perform this function more efficiently than other political committees, for a corporation can pay its fund's administrative and solicitation expenses from the organization's general treasury, 2 U.S.C. § 441b(b)(2)(C), while other political committees must use their supporters' contributions to defray these substantial expenses. This special advantage for separate segregated funds, which was added to the Act in 1971, *see* n.10, p. 12, *supra* was the subject of complaint during the hearings on the 1979 amendments to the Act, although Congress did nothing to change it. *See Hearing Before the Committee on Rules and Administration, United States Senate, 96th Cong., 1st Sess. 37-38, 40, 46, 48-53 (1979), reprinted in FEC, Legislative History of the Federal Election Campaign Act Amendments of 1979, at 43-44, 46, 52, 54-59 (1983).*

performing this service for its supporters is too "bothersome" can hardly be considered an objection of constitutional stature, particularly since it has not deterred MCFL from establishing and operating a separate segregated fund for the last six years. The statute itself does not limit MCFL's ability to transform contributions from consenting members into political speech, and that is enough to satisfy the test applied by this Court.³²

III. SECTION 441b IS SUPPORTED BY COMPELLING GOVERNMENTAL INTERESTS THAT OUTWEIGH ANY IMPACT ON MCFL'S POLITICAL ACTIVITIES

A. We demonstrated in our opening brief, pp. 29-33, that in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), this Court found the purposes underlying section 441b to be compelling enough to overcome first amendment objections like the ones raised by MCFL, even as applied to the nonprofit, ideological corporation in that case. MCFL argues (Br. 42 n.27, quoting J.S. App. 23a) that the *National Right to Work Committee* decision is inapplicable here because that case involved

³² MCFL asserts (Br. 28) that it was precluded from establishing a separate segregated fund in 1978 because it was a non-membership corporation at that time. However, as shown in our opening brief, p. 22 n.11, this would not have precluded MCFL from establishing a separate segregated fund; indeed, the *National Right to Work Committee* was also a nonmembership corporation when it established its separate segregated fund. *See FEC v. National Right to Work Committee*, 459 U.S. at 200. Any limits on solicitation would have resulted solely from MCFL's self-imposed restriction on membership in the corporation, and this Court held in *FEC v. National Right to Work Committee*, 459 U.S. at 206, that limiting solicitation for a separate segregated fund to a corporation's actual members is not unconstitutional. The statute permits anyone who chooses to join a corporation or union to be solicited for contributions to its separate segregated fund; it was MCFL, not Congress, that refused until 1980 to permit its supporters to associate with the corporation by becoming members.

corporate "solicitation for direct contributions to candidates" rather than independent expenditures to communicate with the public. In fact, what was at issue in *National Right to Work Committee* was a provision of the statute that *completely* prohibits corporations from communicating independently with sympathetic members of the public to solicit contributions to the corporation's own political committee, not to candidates. There was no allegation that the solicitations distributed to the public by the National Right to Work Committee were coordinated with any candidate, and there was no evidence that the money collected was not used for independent expenditures as well as contributions to candidates.

The fact that the independent communications prohibited in *National Right to Work Committee* contained solicitations for contributions does not lower the standard of constitutional review. To the contrary, this Court has repeatedly invalidated other statutory restrictions on the solicitation of contributions under the first amendment because "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *Accord*, e.g., *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).³³ Thus, the statutory purposes found compelling enough to justify *complete* prohibition of the independent public solicitations of the ideological corporation in *National Right to Work Committee* cannot be dismissed as inadequate to support the

³³ In fact MCFL's special election flyer included a solicitation for contributions to support further election advocacy (R., Vol. I, Pl. 16, Ex. A, p. 8).

far less intrusive impact on corporate speech at issue in this case.³⁴

B. MCFL argues that the purposes behind section 441b are inapplicable here because MCFL is a nonprofit corporation whose money comes from contributions, and its expenditure was too small to corrupt candidates. However, this Court in *FEC v. National Right to Work Committee*, 459 U.S. at 210, found section 441b to be a permissible prophylactic rule aimed at the potential for abuse inherent in the corporate structure, and found it

³⁴ MCFL relies heavily upon cases striking down actual limitations on independent expenditures, which are not on point because, as we have shown, section 441b is not such a limitation. However, most of those cases also involved ballot measure elections, and this Court has repeatedly emphasized that the rationale for striking down limitations on corporate expenditures in ballot measure campaigns is not transferrable to candidate elections. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 788 n.26 ("[A] corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."); *FEC v. National Right to Work Committee*, 459 U.S. at 210 n.7; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 299 n.6; *FCC v. League of Women Voters*, 468 U.S. at 372 n.9. MCFL's reliance upon *FEC v. National Conservative Political Action Committee* is also misplaced because the Court there distinguished *National Right to Work Committee* as "turn[ing] on the special treatment historically accorded corporations," and noted that NCPAC was "not a 'corporations' case because § 9012(f) applies not just to corporations but to any [political committee]." 105 S. Ct. at 1468. *Accord Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 300 (Rehnquist, J., concurring). In fact, just a few weeks ago a federal court relied upon this distinction in upholding a Michigan statute that prohibits corporate expenditures in candidate elections except through a separate segregated fund. *Michigan State Chamber of Commerce v. Austin*, No. G85-496, slip op. at 14-15 (W.D.Mich. Sept. 3, 1986) (copies of this decision have been lodged with the Court). In sum, even if section 441b were the absolute prohibition of corporate expenditures in candidate elections that MCFL imagines it is, the cases upon which MCFL relies would still not require its invalidation.

constitutionally valid regardless of the size or wealth of the particular corporation involved. Moreover, the Court in that case found the purposes behind the statute to be fully applicable to a nonprofit, ideological corporation whose treasury was also accumulated through contributions from supporters rather than business transactions. It is too late to rely upon such circumstances to escape application of section 441b.³⁵

Finally, the fact that MCFL's adherents may not currently contribute large amounts to the corporation does not diminish Congress' important interest in safeguarding their right to make only "knowing free-choice donations" ³⁶ to support MCFL's election expenditures. See *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066, 1075 (1986).³⁷

³⁵ In fact, nonprofit corporations can and do accumulate substantial wealth. For example, *amicus* Chamber of Commerce states (Br. 1) that it has thousands of corporate members whose dues make up its treasury, and reports filed with the Commission by *amicus* National Rifle Association show that it spent more than 1.4 million dollars through its separate segregated fund during the 1983-84 election cycle—including more independent expenditures than any other corporate or union fund. *FEC Reports on Financial Activity 1983-1984*, Vol. IV, p. 358 (May 1985); *FEC Press Release*, "FEC Reports 1983-1984 Independent Spending Activity" (Oct. 4, 1985) at p. 3.

³⁶ *Pipefitters v. United States*, 407 U.S. at 414 ("the test of voluntariness under § 610 focuses on whether the contributions solicited for political use are knowing free-choice donations"); *id.* at 417 ("the only requirements for permissible political organizations were that they be funded through separate contributions and that they be recognized by the donors as political organizations to which they could refuse support.").

³⁷ MCFL suggests (Br. 42-43 n.28) that section 441b is under-inclusive because Congress has not included lobbying expenditures in that statute and because noncorporate business entities are not covered. The first point is simply wrong, for Congress has not left lobbying unregulated, but has simply decided that "[l]obbying is a separate field which has traditionally been, and should continue to be, regulated separately." 117 Cong. Rec. 43,380 (1971) (re-

C. MCFL describes (Br. 46) the danger of apparently ideological corporations largely funded by business corporations making independent expenditures to serve the interests of their corporate sponsors as a "fantasy," arguing that a corporate contribution to an ideological corporation for the purpose of independent expenditures would still be a violation of section 441b, and that 2 U.S.C. § 434(c) would require the ideological corporation to report contributions to it that are earmarked for independent expenditures. However, it would take an excessively naive corporation to earmark its funding of an ideological corporation for independent expenditures. The real danger is that such ideological front groups could receive general funding from corporations whose business purposes they serve, and as one method of serving those interests make extensive expenditures to elect federal candidates who will aid their supporters' business interests. Nothing in the Act requires such general funding to be disclosed any more than MCFL was obligated to report the names of all of its general contributors.³⁸

marks of Rep. Hansen), 1971 *Leg. Hist.* at 758. Lobbying expenditures are, in fact, extensively regulated under other statutes. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *United States v. Harriss*, 347 U.S. 612 (1954). The second point has already been rejected by this Court on several occasions on the ground that Congress has authority to make a "judgment" that "entities hav[ing] differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC*, 453 U.S. at 201; *FEC v. National Right to Work Committee*, 459 U.S. at 210.

³⁸ In attempting to analogize this case to *FEC v. National Conservative Political Action Committee* ("NCPAC"), 105 S. Ct. 1459 (1985), MCFL fails to acknowledge that, as a political committee, NCPAC does report the names of its contributors, while MCFL seeks to make political expenditures like NCPAC's without doing so. MCFL thus seeks a special status that NCPAC, and any other "group of persons which . . . makes expenditures aggregating in

While it may well be true, therefore, that corporate contributions to an ideological corporation for the purpose of financing electoral contributions and expenditures would be a violation of section 441b (and perhaps section 441f as well), without the segregation of money used for election expenditures and the reporting of the sources of those funds, neither the Commission nor the voting public would be aware that such violations had occurred.³⁹ This only strengthens the governmental interest in disclosure of the sources of financing of an ideological corporation's election expenditures, for this Court has recognized the government's compelling interest in disclosure as "an essential means of gathering the data necessary to detect violations." *Buckley v. Valeo*, 424 U.S. at 68.

excess of \$1,000," 2 U.S.C. § 431(4)(A), are denied. MCFL attempts to avoid this inconsistency by asserting (Br. 45) that election expenditures do not make a group a political committee unless supporting or opposing candidates is its "major purpose." However, as this Court noted recently with respect to the parallel definition of "political committee" in the public financing statute, 26 U.S.C. § 9002(9), the express terms of the statute quoted above make any organization that accepts contributions or makes expenditures to influence federal elections a "political committee." See *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1466. MCFL's expenditure of more than \$9,000 on its special election edition would make it a political committee under the terms of the statute, required to report all of its contributors of more than \$200.00, if that expenditure had been lawful. Of course, contrary to MCFL's assertion (Br. 45 n.30), the Commission found no probable cause to believe MCFL was a political committee because it found MCFL's expenditures to be unlawful under section 441b.

³⁹ For example, *amicus* Chamber of Commerce was established to serve, *inter alia*, the business interests of its thousands of corporate members, who provide general funding to the Chamber. Under MCFL's scenario, the Chamber could make large expenditures from its general treasury to influence federal elections in order to benefit its members' business interests, yet it would have no earmarked contributions to report.

D. MCFL repeatedly asserts (Br. at 43 n.28, 45, 46) that the Commission has not demonstrated that section 441b represents the least intrusive way of serving the governmental interests involved.⁴⁰ For the most part, however, MCFL has failed to suggest any way in which those purposes could be served in a less intrusive way. In fact section 441b serves the purposes we have identified in the manner least restrictive of constitutional rights. Thus, by requiring segregation of political funds, Congress has been able to ensure disclosure of only those who contribute separately to the corporation's political activities,⁴¹ to protect contributors' ability to make a separate, informed decision about supporting a corporation's political activities, and to screen from the electoral process the aggregations of wealth accumulated under the special advantages of the corporate structure, while at the same time permitting corporations and unions to use

⁴⁰ Since, as we have shown, section 441b does not actually restrict the ability of corporations and unions "to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme." *California Medical Ass'n v. FEC*, 453 U.S. at 199 n.20 (plurality opinion).

⁴¹ MCFL argues (Br. 45) that "[i]f Congress wants the names of all contributors to a non-profit corporation which engages in any express advocacy to be made public, it could enact such a statute." Initially, it is obvious that this would be *more* intrusive than section 441b's requirement that only those who contribute directly to a corporation's political activities need be reported. Moreover, Congress clearly does *not* want to make public the names of all contributors to nonprofit corporations; the mechanism of section 441b ensures that only the names of those who choose to make discrete contributions to the corporation's political fund need be disclosed. Finally, MCFL does not really believe this is a less intrusive method of serving Congress' interests, for it goes on to cast doubt on whether such a provision could "survive constitutional scrutiny."

their separate segregated funds to amplify the voices of their supporters in the electoral realm.

The alternative arrived at by the court of appeals and defended by MCFL is far more intrusive than the statute enacted by Congress. By exempting "ideological" corporations from the Act, the court of appeals' decision would require the Commission and the courts to investigate the political views and activities of an organization in order to determine, under some as yet undefined test, whether the corporation is truly "ideological." This would require, at least, investigation of the names and interests of the organization's supporters and contributors to determine whether an ideological facade conceals an actual economic special interest. See FEC Brief at 35-36. Such an investigation would run counter to first amendment values, and an evaluation by the Commission or the courts of whether an organization's views are "ideological" or economic—assuming such a distinction can reliably be drawn—even more so. *See, e.g., NAACP v. Alabama*, 357 U.S. at 459-62; *Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 878-80 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *cited in Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 848 n.23 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). The legislation enacted by Congress avoids this difficult and intrusive inquiry altogether, and does so without limiting corporate or union political speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening brief, the decision of the court of appeals that 2 U.S.C. § 441b is unconstitutional as applied to uncoordinated expenditures of nonprofit corporations should be reversed.

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No. 85-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF FOR COMMON CAUSE AS AMICUS CURIAE**

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Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

**MOTION FOR LEAVE TO FILE BRIEF FOR
COMMON CAUSE AS AMICUS CURIAE**

Pursuant to Rule 42 of the Rules of this Court, Common Cause hereby moves this Court for leave to file a brief as *amicus curiae* in this case. Counsel for Appellee has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for Appellant was requested but was refused.

As set forth in the attached brief at 1-4, Common Cause has a strong interest in the disposition of this appeal and believes that its perspective differs from that

of any party. In its brief, Common Cause urges the Court to reverse the decision below and in that respect seeks the same result as the appellant. This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

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February 27, 1986

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-701

FEDERAL ELECTION COMMISSION,

v. *Appellant,*

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

INTEREST OF THE AMICUS
AND SUMMARY OF ARGUMENT

Common Cause is a nonprofit, nonpartisan organization with approximately 250,000 members. One of its central purposes is to further responsible and honest government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process, including other cases before this Court concerning the constitutionality and implementation of the federal election laws.¹

¹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *FEC v. National Conservative Political Action Comm.*, 105 S. Ct. 1459 (1985).

I.

Section 441b is constitutional on its face. This Court's recent unanimous decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("NRWC"), confirmed that section 441b serves two compelling governmental interests—the prevention of actual and apparent corruption and the protection of corporate shareholders and union members. Those interests are "sufficient to justify" the statute's prohibitions and are "sufficiently tailored" to avoid undue restriction of First Amendment rights. *Id.* at 208. NRWC built on earlier decisions of this Court which recognized the critical importance of preventing actual and apparent electoral corruption, *see, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *United States v. International Union United Automobile Workers*, 352 U.S. 567 (1957), and on other decisions which concluded that corporate election spending presents particularly acute risks of electoral corruption, *see, e.g., California Medical Association v. FEC*, 453 U.S. 182 (1981).

The logic of NRWC and these other decisions compels the conclusion that Congress acted constitutionally in barring corporate and union expenditures as well as contributions. Congress, after painstaking consideration, found that even independent expenditures by corporations and unions directly implicate the compelling purposes section 441b serves. Section 441b imposes only slight burdens on First Amendment interests, which are justified in view of the unique characteristics of the corporate form. This case, therefore, is altogether different from *Buckley v. Valeo*, *supra*, and *FEC v. NCPAC*, 105 S. Ct. 1459 (1985), where the Court could discern no basis for concluding that independent expenditures by individuals and political committees presented risks of actual or apparent corruption. Those were not "'corporations' case[s]." *See id.* at 1468.

It has for years been Congress' expert judgment that a general ban on all corporate and union contributions

and expenditures is necessary to protect the integrity of the electoral process and to protect corporate shareholders and union members. Congress cautiously adapted section 441b over 79 years to account for the special attributes of and threats presented by organizations in corporate and union form. *See NRWC*, 459 U.S. at 209. In particular, Congress, upon an ample factual record, found that it was necessary for section 441b to cover independent expenditures in order for the statute to achieve its compelling objectives.

II.

Section 441b is constitutional as applied to Massachusetts Citizens for Life ("MCFL"). A clear line that places all corporations and unions within the scope of section 441b is necessary to prevent evasions of the statute and vexing questions of degree. Such Congressional line-drawing is entitled to deference. NRWC sustained the applicability of section 441b to an organization remarkably similar to MCFL. The Court rightly declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 208. MCFL can, as it subsequently did, form a "political committee" to raise and spend money in federal elections; the burden on members' First Amendment rights is inconsequential in these circumstances.

In the unlikely event that there are doubts as to the constitutionality of section 441b as applied to MCFL, the Court could avoid the necessity of resolving those doubts by reading a narrow exception into section 441b for corporations that: (1) are not-for-profit and do not engage in any commercial activities; (2) have no shareholders or others with a claim on their earnings; (3) were not established by a business corporation or union and do not accept contributions from such entities; and (4) were formed for the express purpose of promoting political or ideological positions and are funded solely by voluntary contributions from individuals who have been

informed that the funds will be spent in connection with federal elections.

If the Court should decide to read such a tightly circumscribed exception into the statute, it should make clear that any corporation that came within that exception would be a "political committee" under the Federal Election Campaign Act, 2 U.S.C. § 431(4)(A), subject to that Act's disclosure requirements and contribution limits.

ARGUMENT

This Court's unanimous decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("NRWC"), requires reversal of the decision below.

Even apart from that direct authority, Congress plainly has the power to prohibit corporations and labor unions, as a general matter, from giving financial support to federal candidates. Congress has found repeatedly over 79 years that such a prohibition serves compelling interests in protecting the integrity of the electoral process. Thus, there can be no serious question that 2 U.S.C. § 441b is constitutional on its face.

The only substantial constitutional question here is whether Congress drew the line at an improper point when it barred all use of the corporate form for engaging in financial support of federal candidates, including use by individuals who wish to associate for purely ideological purposes. The prohibition on use of the corporate or union form leaves ample scope for such individuals to exercise freedom of speech and association through other forms of organization, including affiliated "separate segregated funds" and other political committees.² In these circumstances, the clearcut line that Congress drew is appropriate and constitutional, because it provides the most certain standard in an area that would otherwise be vexed by evasions, circumventions, and close questions of degree.

² See 2 U.S.C. §§ 441b(b)(2)(C), 431(4) (1982).

I. SECTION 441b IS CONSTITUTIONAL ON ITS FACE.

This Court's decisions in *NRWC* and previous cases establish that section 441b is constitutional on its face. The statute has been found to serve two compelling governmental interests: (1) preventing the actual and apparent corruption that could arise if corporations and unions were free to use the funds amassed as a result of their unique organizational characteristics to make contributions or expenditures in federal elections; and (2) protecting the interests of corporate shareholders and union members. This Court has deferred to Congress' expert judgment, reaffirmed in repeated enactments over many decades, that a ban on corporate and labor union giving and spending in connection with federal elections is necessary to achieve those purposes. In short, both this Court and Congress have recognized section 441b to be an essential cornerstone of our federal campaign finance laws.

A. This Court's Decisions Establish the Facial Constitutionality of Section 441b.

This Court's decisions foreclose any argument that section 441b's prohibition of corporate and union contributions and expenditures is unconstitutional on its face.

Most recently, in *NRWC*,³ a unanimous Court upheld the constitutionality of section 441b's prohibition of a corporation's expenditure of treasury funds to solicit contributions from the public at large for its separate segregated fund, or political action committee ("PAC").⁴ The

³ 459 U.S. 197 (1982).

⁴ *NRWC* was a corporation prohibited from making contributions or expenditures with its own funds, except as provided by section 441b(b). 459 U.S. at 205 n.6. If the corporation had spent money to solicit contributions from persons other than its members, then it had violated section 441b by expending corporate treasury funds to influence the general public in connection with a federal election. 501 F. Supp. 422, 437 (D.D.C. 1980) (district court opinion). This Court decided that the persons solicited by *NRWC* were not its

PAC planned to use the money to make contributions and independent expenditures supporting and opposing candidates for federal office.⁵ This Court resoundingly confirmed that the compelling governmental interests underlying section 441b—preventing corruption and the appearance of corruption, and protecting minority shareholders—were “sufficient to justify” the statute’s prohibitions.⁶ The Court found the statutory provisions “sufficiently tailored” to those compelling interests “to avoid undue restriction” on First Amendment interests,⁷ and concluded that the statute “reflects a permissible assessment of the dangers posed by [corporations] . . . to the electoral process.”⁸ The *NRWC* opinion reaffirmed that corporations are special entities requiring “particularly careful regulation.”⁹

NRWC built on a long line of cases in which this Court has recognized the importance of preventing both the fact and the appearance of corruption of elected officials, and the harm to public confidence in our system of representative government occasioned by such actual or apparent corruption.¹⁰ It “has never been doubted” that

members and upheld the constitutionality of section 441b’s ban on such corporate spending.

⁵ See 501 F. Supp. at 426; 665 F.2d 371, 373 (D.C. Cir. 1981) (court of appeals opinion).

⁶ *NRWC*, 459 U.S. at 208.

⁷ *Id.*

⁸ *Id.* at 209.

⁹ *Id.* at 209-10. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.13 (1978) [*“Bellotti”*] (“a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations”).

¹⁰ *NRWC*, 459 U.S. at 208; *Bellotti*, 435 U.S. at 788-89; *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) [*“Buckley”*] (“avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent’”) (quoting *United States Civil Service Comm’n v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973) [*“Letter Carriers”*]); *United States v. International Union United*

those interests are “of the highest importance.”¹¹ Those interests directly implicate “the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process . . . issues . . . less than basic to a democratic society.”¹²

NRWC also reflects the Court’s past conclusion that corporate giving and spending markedly implicate the compelling interest in preventing corruption and the appearance of corruption.¹³ Corporations are artificial legal entities endowed by the state with special advantages—such as limited liability, perpetual life, and special tax treatment—to facilitate their business objectives.¹⁴ Those special advantages, “so beneficial in the economic sphere, pose special dangers in the political sphere.”¹⁵ The Court has repeatedly recognized the crucial role sec-

Automobile Workers, 352 U.S. 567, 575 (1957) [*“Auto Workers”*]; *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934); see *FEC v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1469 (1985) [*“NCPAC”*].

¹¹ *Bellotti*, 435 U.S. at 788 n.26, 788-89.

¹² *Auto Workers*, 352 U.S. at 570; *id.* at 575 (section 441b serves to “sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”)

¹³ See *NRWC*, 459 U.S. at 209-10 (“the special characteristics of the corporate structure require particularly careful regulation”); *California Medical Ass’n v. FEC*, 453 U.S. 182, 201 (1981) [*“CMA”*].

¹⁴ In 1819, Chief Justice Marshall described the unique status of a corporation in the eyes of federal law:

“A Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as supposed best calculated to effect the object for which it was created.”

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); see also *Bellotti*, 435 U.S. at 809 (White, J., dissenting).

¹⁵ *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting).

tion 441b plays in avoiding "the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital."¹⁶

The Court has found that the risk of actual or apparent corruption from involvement by corporations or unions in candidate elections is exacerbated by the economic purposes that guide the behavior of those entities.¹⁷ Business corporations are created for economic profit; accordingly, their contributions and expenditures are almost necessarily made in order to receive something tangible in return.¹⁸ This explains why, for example, Gulf Oil, Minnesota Mining and Manufacturing, and Diamond International, to name a few, made illegal corporate contributions to candidates of both parties in the 1972 presidential election.¹⁹

In addition, this Court has frequently recognized that section 441b protects shareholders and union members who have paid money into a corporation or union "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."²⁰ Congress made clear that

¹⁶ *Auto Workers*, 352 U.S. at 585.

¹⁷ See *CMA*, 453 U.S. at 201.

¹⁸ *Hearings on Contributions to Political Committees in Presidential and Other Campaigns Before the House Comm. on Election of President, Vice President, and Representatives in Congress*, 59th Cong., 1st Sess. 12 (1906) ["1906 Hearings"]; *Hearings Before a Subcomm. of the House Comm. on Labor*, H.R. 804 and H.R. 1483, 78th Cong., 1st Sess. 71, 96, 146 (1943) ["1943 Hearings"].

¹⁹ Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. 464, 469, 484 (1974) ["Senate Watergate Committee Report"].

²⁰ See, e.g., *NRWC*, 459 U.S. at 208, citing *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 113 (1948) ["CIO"]; see *Bellotti*, 435 U.S. at 787-88; *Pipefitters Local Union 562 v. United States*, 407 U.S. 385, 413-16 (1972) ["Pipefitters"]. In other contexts as well, this Court has recognized the right of individuals not to be compelled to support candidates or political posi-

"[t]hese funds belong to the stockholders, and the officers have been forbidden by law for years from using the stockholders' funds in an election for these Federal officers."²¹

The logic of *NRWC* and these other cases compels the conclusion that Congress can constitutionally prohibit corporate and union expenditures, as well as contributions, in connection with federal elections.²² As the Court observed in *Bellotti*, Congress legitimately could find "the existence of a danger of real or apparent corruption in independent expenditures by corporations [as distinct from individuals] to influence candidate elections."²³ Section 441b is based on a thorough Congressional investigation and documentation of the threat such expenditures pose to the integrity of the electoral process.²⁴ This

tions they oppose. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

²¹ 93 Cong. Rec. 7492 (1947).

²² The lower courts have uniformly upheld the constitutionality of section 441b in both contexts. See *Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc), appeal dismissed, cert. denied, 465 U.S. 1092 (1984) (challenge to prohibition on corporate contributions and expenditures, rejected on basis of *NRWC*); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973); *United States v. Chestnut*, 533 F.2d 40 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1976); *Pipefitters*, 434 F.2d 1116 (8th Cir. 1970), rev'd on other grounds, 407 U.S. 385 (1972); *FEC v. Weinstein*, 462 F. Supp. 243 (S.D.N.Y. 1978).

²³ 435 U.S. at 788 n.26.

²⁴ See *infra* pp. 14 to 15; see generally House Special Comm. to Investigate Campaign Expenditures, *Campaign Expenditures*, H.R. Rep. No. 2093, 78th Cong., 2d Sess. (1945) ["1945 House Investigative Report"]; Senate Special Comm. to Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures in 1944, *Investigation of Presidential, Vice Presidential, and Senatorial Campaign Expenditures, 1944*, S. Rep. No. 101, 79th Cong., 1st Sess. (1945) ["1945 Senate Investigative Report"]; House Special Comm. to Investigate Campaign Expenditures, 1946, *Campaign Expenditures*, H.R. Rep. No. 2739, 79th Cong., 2d Sess. (1947) ["1947

Court should "not second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." ²⁶

The compelling governmental interests in prohibiting all direct financial involvement by corporations and unions in federal election campaigns far outweigh the effects of section 441b on the exercise of First Amendment rights. As this Court has repeatedly declared and as it reaffirmed in *NRWC*, "[n]either the right to associate nor the right to participate in political activities is absolute." ²⁶ In *NCPAC*, the Court specifically stated, "[i]n return for the special advantages that the state confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." ²⁷ And this Court has recognized that "[t]he differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." ²⁸

House Investigative Report"]; Senate Special Committee to Investigate Senatorial Campaign Expenditures, 1946, *Investigation of Senatorial Campaign Expenditures, 1946*, S. Rep. No. 1, 80th Cong., 1st Sess. (1947) ["1947 Senate Investigative Report"].

²⁶ *NRWC*, 459 U.S. at 210.

²⁶ *Id.* at 207, quoting *Letter Carriers*, 413 U.S. at 567; see also *Buckley*, 424 U.S. at 25. To further its legitimate goals, Congress may properly require a group to comply with reasonable structural or organizational rules in order to exercise First Amendment rights. See, e.g., *Regan v. Taxation with Representation*, 461 U.S. 540, 543-45 & n.6 (1983) ("not unduly burdensome" to require a group to establish separate affiliated organization for lobbying activities in order to preserve tax deductibility of contributions for nonlobbying activities).

²⁷ *NCPAC*, 105 S. Ct. at 1468.

²⁸ *CMA*, 453 U.S. at 201, quoted in part in *NRWC*, 459 U.S. at 210.

Section 441b, then, presents an altogether different case than was presented in either *Buckley*, where the Court struck down a limit on independent expenditures by individuals and political committees,²⁹ or *NCPAC*, where it invalidated a limit on independent expenditures by any "committee, association, or organization (whether or not incorporated)." ³⁰ This Court expressly stated in *NCPAC*, "this is not a 'corporations' case." ³¹ In both *Buckley* and *NCPAC*, the Court could discern no basis for a finding that the independent expenditures there in question could, under the circumstances, present a risk of actual or apparent corruption.³² Here, in contrast, the Court has recognized that Congress could legitimately conclude that, because of the unique characteristics and purposes of corporations and unions, their independent expenditures would present palpable risks of corruption.³³ As we show in the next section, Congress has held to that view for many years.

B. It Has Been Congress' Expert Judgment for Decades That a General Prohibition of Contributions and Expenditures by Corporations and Unions Is Necessary To Achieve Compelling Public Interests.

Congress enacted, and later reenacted, section 441b against a backdrop that shows vividly the need for the statute and its crucial role in preserving the integrity of the electoral process. As Justice Frankfurter recognized, "[a]ppreciation of the circumstances that begot

²⁹ *Buckley*, 424 U.S. at 39-51.

³⁰ *NCPAC*, 105 S. Ct. at 1468.

³¹ *Id.*

³² *Buckley*, 424 U.S. at 46 ("the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"); *NCPAC*, 105 S. Ct. at 1469 ("On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more").

³³ *Bellotti*, 435 U.S. at 788 n.26.

this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us.”³⁴

Section 441b found its origin in the growing concern at the turn of the century over the vast economic power of corporations and the undue influence they wielded in the political sphere, “an influence not stopping short of corruption.”³⁵ Public sentiment swelled in the early 1900s in reaction to the public disclosure that national banks, insurance companies, and other business interests had given large sums to political parties and candidates, and attained commensurate influence over the politicians whose campaigns they had financed.³⁶ The massive influx of corporate funds in the 1904 election “crystallized popular sentiment for federal action to purge national politics of what was perceived to be the pernicious influence of ‘big money’ campaign contributions.”³⁷

³⁴ *Auto Workers*, 352 U.S. at 570.

³⁵ *Id.*

³⁶ E. Zuckerman, *Origins of the 1907 Tillman Act* (Aug. 1982) (Fund for Constitutional Government). The Legislative Insurance Investigation Committee of New York discovered that in the presidential campaigns of 1896, 1900 and 1904, substantial amounts of money belonging to insurance policyholders was paid into party treasuries. The Committee concluded:

“Contributions by insurance corporations for political purposes should be strictly forbidden. Neither executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates. . . . Whether made for the purpose of supporting political views or with the desire to obtain protection for the corporation, these contributions have been wholly unjustifiable. In the one case executive officers have sought to impose their political views upon a constituency of divergent convictions, and in the other they have been guilty of a serious offense against public morals.”

10 Report of the Joint Comm. on the Senate and Assembly of the State of N.Y. Appointed to Investigate the Affairs of Life Insurance Companies, 24, 110, 298, 334, 393, 397 (1906); see also 42 Cong. Rec. 696 (1908).

³⁷ *Auto Workers*, 352 U.S. at 571-72.

President Theodore Roosevelt responded by calling for legislation banning political contributions by corporations:

“The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use. . . .”³⁸

“All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders’ money for such purposes. . . .”³⁹

In 1907, Congress enacted the Tillman Act, which made it “unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election . . . [and] for any corporation whatever to make a money contribution in connection with any [federal] election.”⁴⁰ The legislative history reveals Congress’ appreciation of the two compelling interests served by the prohibition—preventing the pernicious influence of corporate money in the electoral process, and prohibiting corporate managers from “defrauding the stockholders of money dishonestly and for an improper purpose.”⁴¹

The Tillman Act was but “the first concrete manifestation of a continuing congressional concern for elections

³⁸ 40 Cong. Rec. 91 (1905).

³⁹ *Id.* at 96; see also 1906 Hearings, *supra* note 18, at 12.

⁴⁰ 34 Stat. 864 (1907).

⁴¹ 1906 Hearings, *supra* note 18, at 76 (“no corporation has the right and no board of directors of a corporation and no manager of a corporation has the right to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use”); see *id.* at 76-78.

'free from the power of money.'"⁴² Since 1907, Congress has repeatedly reaffirmed the basic statute, while refining it. In 1925, Congress enacted the Federal Corrupt Practices Act to strengthen the statute by extending the definition of contribution to include "anything of value" and by penalizing the recipient of an illegal contribution as well as the giver.⁴³

Congress later extended the statute to cover labor unions. With the rise in union political activities in the 1930s and 1940s, "the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."⁴⁴ Congress enacted temporary wartime legislation to curb those abuses by extending the ban on contributions to labor unions, and made the prohibition permanent in the Taft-Hartley Act of 1947.⁴⁵

During the 1940s, evidence mounted that corporations and labor unions were circumventing the ban on contributions by making expenditures. The House Special Committee on Campaign Expenditures, after an extensive investigation, concluded that the prohibition on contributions was rendered ineffective by widespread coordinated and independent expenditures which posed a grave

⁴² *Auto Workers*, 352 U.S. at 575 (citation omitted).

⁴³ 43 Stat. 1070, 1071, 1073 (1925).

⁴⁴ *Auto Workers*, 352 U.S. at 578; see 1943 Hearings, *supra* note 18, at 2 ("The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.").

⁴⁵ War Labor Disputes Act, 57 Stat. 633 (1943); Labor Management Relations Act of 1947, 61 Stat. 136 (1947); see *CIO*, 335 U.S. at 115.

risk of actual or apparent corruption. The Committee found:

"The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"⁴⁶

A Senate investigative committee made similar findings and recommended that Congress extend the statute to cover corporate and union expenditures in order to:

"plug the existing loophole whereby corporations, national banks, and labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing their financial assistance in the form of an 'expenditure' rather than a contribution."⁴⁷

Congress therefore amended the law to proscribe expenditures as well as contributions.⁴⁸

⁴⁶ 1947 House Investigative Report, *supra* note 24, at 39. The Committee dealt with independent expenditures as well as those that were coordinated with candidates. *Id.* at 27-29. The report stated, "The committee feels that whether or not the activities carried on by these organizations and the payment of salaries to men known as organizers or advisers who go into the congressional districts and actively assist in local campaign activities, and expenditures for radio time, newspaper advertising, printing and distribution of handbills and posters, and for transportation of voters, constitute violations of the letter of the Federal Corrupt Practices Act, they certainly constitute violations of the spirit and intent of the law and the acts should be so amended as to clearly and distinctly set out that such activities are prohibited." *Id.* at 42-43.

⁴⁷ 1947 Senate Investigative Report, *supra* note 24, at 38-39.

⁴⁸ 61 Stat. 136 (1947). See 93 Cong. Rec. 6439 (1947) (remarks of Sen. Taft, a sponsor of the bill); see also *CIO*, 335 U.S. at 115.

In 1971, Congress amended the statute to clarify the means of political participation that remain open to corporations and unions despite the ban on contributions or expenditures of treasury funds in federal elections. The amendments redefined the terms "contributions" and "expenditures" to permit corporations and labor unions to establish separate segregated funds ("PACs"), to communicate to their stockholders or members, and to engage in nonpartisan get-out-the-vote campaigns aimed at stockholders or members.⁴⁹ At the same time, Congress reaffirmed the need to maintain "a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to Federal candidates."⁵⁰ In the words of Rep. Orval Hansen, the sponsor of proposed amendments to the statute:

"... the underlying theory of section 610 [now section 441b] is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder."⁵¹

The 1971 amendments thus reflected "broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution."⁵²

The Watergate scandal in 1972 once again focused the attention of Congress on section 441b and reconfirmed the compelling need for a ban on corporate contributions and expenditures. The Final Report of the Select Committee on Presidential Campaign Activities is replete

("Since it was obvious that the statute as construed could easily be circumvented, . . . § 304 extended the prohibition of § 313 to 'expenditures.'").

⁴⁹ See 2 U.S.C. § 441b(b) (2) (1982).

⁵⁰ 117 Cong. Rec. 43381 (1971).

⁵¹ *Id.*

⁵² *Id.*, quoted in *Pipefitters*, 407 U.S. at 431.

with examples of illegal corporate activity that are vivid reminders of why the statute remains so essential.⁵³

American Airlines, for example, gave \$55,000 in corporate funds to President Nixon's campaign because it was told that a large gift would put it in a "special class," and because it was afraid that it would be "prevented from getting something" if it did not give.⁵⁴ Ashland Oil gave \$100,000 to the President's campaign and spent \$10,000 to buy an advertisement supporting him. Ashland's Chairman explained the gift as an attempt "to assure ourselves of a forum . . . we felt we needed something that would be sort of a calling card, something that would let us in the door and make our point of view heard."⁵⁵ Associated Milk Producers, Inc. ("AMPI"), a dairy producers membership corporation, made illegal expenditures of \$137,000 to assist the campaigns of Senator Humphrey and other Democratic candidates and officials.⁵⁶ Claude C. Wild, Jr., then Vice President of Gulf Oil, explained to the Senate Select Committee that Gulf had illegally contributed to three presidential candidates because of its fear that if Gulf did not participate, it might be placed on a "blacklist" or at the "bottom of the totem pole."⁵⁷

In 1976, Congress further refined section 441b by enacting detailed provisions governing the expenditure of corporate funds to solicit contributions to a separate

⁵³ Corporations would be in a position to dominate campaign finance. Prior to the Tillman Act, over 70% of the contributions collected by the Republican National Committee in 1904 came from representatives of corporations. H. Pringle, *Theodore Roosevelt: A Biography* 357 (1931), citing Campaign Contributions: Testimony Before a Subcomm. of the Senate Comm. on Privileges and Elections, vol. 1, 62d Cong., 2d Sess. 204-06 (1912).

⁵⁴ Senate Watergate Committee Report, *supra* note 19, at 447-51.

⁵⁵ *Id.* at 459-60.

⁵⁶ *Id.* at 870-81.

⁵⁷ *Id.* at 469.

segregated fund ("PAC").⁵⁸ In doing so, Congress reaffirmed its unbroken conviction that the prohibitions in section 441b are critical to the integrity of the electoral process.⁵⁹

This 79-year history reflects Congress' "careful . . . adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations."⁶⁰ Congress has moved to prohibit activities when the evidence showed that they posed concrete and imminent threats to the electoral process, and it has carefully considered the First Amendment interests affected by its legislation, tailoring the statute to avoid unnecessary intrusion on those interests.⁶¹ In short, Congress has narrowly drawn section 441b to serve admittedly compelling governmental interests.⁶² "This careful legislative adjustment . . . warrants considerable deference" from the Court.⁶³

II. SECTION 441b MAY CONSTITUTIONALLY BE APPLIED TO MCFL BECAUSE IT IS A CORPORATION; IF THE COURT FINDS OTHERWISE, IT MUST TREAT MCFL AS A "POLITICAL COMMITTEE" WHICH IS SUBJECT TO THE FEDERAL ELECTION CAMPAIGN ACT.

A. Section 441b Is Constitutional as Applied to MCFL.

Although the First Circuit did not question the facial constitutionality of section 441b, it held the provision unconstitutional as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation ex-

⁵⁸ See 2 U.S.C. § 441b(b) (4) (1982).

⁵⁹ See 122 Cong. Rec. 8570-72 (1976) (remarks of Rep. Brademas).

⁶⁰ *NRWC*, 459 U.S. at 209 (citation omitted).

⁶¹ See, e.g., *CIO*, 335 U.S. at 120.

⁶² *NRWC*, 459 U.S. at 208.

⁶³ *Id.* at 209.

pressing its views of political candidates."⁶⁴ That conclusion was erroneous. To promote the compelling governmental interests discussed above, Congress may constitutionally prohibit all corporations and unions from making either contributions or expenditures in connection with a federal election.

Section 441b must cover all corporations and unions in order to provide a clear and easily administrable standard. Experience has demonstrated that there are substantial incentives to exploit potential loopholes in campaign finance laws.⁶⁵ Congress has long appreciated the dangers of abuse in this area,⁶⁶ and has concluded that to prevent evasion, section 441b must apply to all corporations and unions. This Court has held that such Con-

⁶⁴ *Juris*. Statement 24a.

⁶⁵ See *supra* note 24; Senate Watergate Committee Report, *supra* note 19; cf. *Buckley*, 424 U.S. at 35-36, 38; Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 364-65 (1977).

⁶⁶ For example, in 1945, a Senate investigative committee reported that the "Common Citizens Radio Committee," incorporated under the laws of the state of Texas for "educational" purposes, was actually seeking to influence the 1944 presidential election and that it had received contributions from numerous business corporations. 1945 Senate Investigative Report, *supra* note 24, at 19-20, 44-53.

In the 1947 debates on the Taft-Hartley Act, Senator Barkley observed that "the National Association of Manufacturers does not manufacture anything, the United States Chamber of Commerce does not sell anything, and the Automobile Chamber of Commerce does not manufacture or sell anything." In response, Senator Taft, the bill's floor manager, stated, "In any event, so long as the money comes from corporations, and with their knowledge, I think it would be clearly illegal anyway, and they would be participating as corporations in spending for political purposes." 93 Cong. Rec. 6438 (1947).

The current campaign finance scandals in West Germany involve allegations that millions of dollars of illegal corporate donations were funneled to political parties through tax-exempt foundations. See, e.g., *N.Y. Times*, Feb. 18, 1986, at A3, col. 5.

gressional line-drawing is entitled to substantial deference.⁶⁷

Applying Congress' bright line, this Court in *NRWC* unanimously upheld the application of section 441b's solicitation limits to a corporation without capital stock organized expressly for ideological purposes—a corporation remarkably similar to Massachusetts Citizens for Life (“MCFL”).⁶⁸ The court of appeals in *NRWC* had ruled that, because *NRWC* was a nonstock corporation organized solely for political purposes, it was constitutionally entitled to solicit funds for its affiliated PAC from persons who were not its members under state law.⁶⁹ This Court rejected the lower court's reasoning,

⁶⁷ See *NCPAC*, 105 S. Ct. at 1470-71 (constitutional to prohibit contributions by membership corporations even though they “might not exhibit all of the evil that contributions by traditional economically organized corporation[s] exhibit”); *Buckley*, 424 U.S. at 70-71 (FECA disclosure requirements are constitutional as applied to minor parties, despite diminished governmental interests in disclosure); *id.* at 83 (\$10 recordkeeping threshold and \$100 reporting threshold are constitutional because the “line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion”); *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (constitutional to ban political activity by all types of classified federal employees, even though “the impartiality of many of these is a matter of complete indifference to the effective performance” of their duties).

⁶⁸ 459 U.S. at 199. *NRWC* was “a nonprofit corporation without capital stock that was formed to educate the public on and to advocate voluntary unionism. *NRWC* conducts a continuous and extensive program of advocacy through the dissemination of information on compulsory unionism to its members and to the general public.” 665 F.2d 371, 373 (D.C. Cir. 1981).

In this case, “MCFL is an ideological, grass roots, nonpartisan corporation organized to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity. . . . It was incorporated in 1973 as a nonprofit, nonstock corporation under Massachusetts law.” Motion to Affirm at 2.

⁶⁹ 665 F.2d at 371, 374 & n.4, 375 n.9, 376.

holding that “the statutory prohibitions and exceptions we have considered are sufficiently tailored to [Congress'] purposes to avoid undue restriction on the associational interests asserted by respondent.”⁷⁰ *NRWC* concluded:

“While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”⁷¹

In *NCPAC*, this Court explained that *NRWC* gave “proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized.”⁷²

Accordingly, MCFL may constitutionally be prohibited from making contributions or expenditures in connection with federal elections. As discussed above, Congress may constitutionally place limits on the right to associate to participate in political activities in order to further compelling governmental interests. In particular, to prevent electoral abuse, Congress may restrict the use of the corporate form.⁷³ Persons sharing political or ideological views have no First Amendment right to associate together *as a corporation* to make campaign-related contributions and expenditures. To the contrary, in *NRWC* the Court declared that the claim that the Constitution guaranteed *NRWC* the right to solicit all those “who have in the past proved ‘philosophically compatible’ to

⁷⁰ 459 U.S. at 208.

⁷¹ *Id.* at 210. As noted above, the *NRWC* holding implicated the ban on corporate expenditures as well as contributions. See *supra* notes 4 & 5.

⁷² *NCPAC*, 105 S. Ct. at 1471.

⁷³ See *supra* pp. 5 to 11; *NRWC*, 459 U.S. at 207, quoting *Letter Carriers*, 413 U.S. at 567; *Buckley*, 424 U.S. at 25; *CMA*, 453 U.S. at 201; cf. *Regan v. Taxation with Representation*, 461 U.S. 540, 543-45 & n.6 (1983).

the views of the corporation . . . would ignore the teachings of our earlier decisions."⁷⁴

The governmental interests in prohibiting all direct financial involvement by corporations in federal election campaigns⁷⁵ outweigh the exceedingly slight burden that section 441b imposes on political expression by individuals who support MCFL. If MCFL's supporters wish to exercise their associational rights and to pool their funds for campaign-related purposes, they may easily form a "political committee"—affiliated with MCFL or independent of it.

Indeed, after making the expenditure at issue here, MCFL established a "separate segregated fund" or PAC.⁷⁶ MCFL may lawfully pay its PAC's administrative and solicitation expenses, and the PAC may lawfully solicit MCFL's members for voluntary contributions.⁷⁷ If, as MCFL claims, its contributors wish their

⁷⁴ 459 U.S. at 210; *id.* at 207 ("In this case, we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.").

⁷⁵ See *supra* pp. 7-10, 19-20. These interests also apply to MCFL. Its contributors knew that the organization's purpose was to oppose abortions, *Juris*, Statement 35a (district court opinion), but the district court did not find that donors realized MCFL would promote this goal by spending money to support or oppose candidates for federal office. In addition, although MCFL states that it does not accept funds from business corporations, Affidavit of Philip D. Moran ¶ 9 (July 9, 1982), this policy is subject to change by a vote of the board of directors.

⁷⁶ *Juris*, Statement 25a n.1 (court of appeals opinion). The fund is named "Massachusetts Citizens for Life Political Action Committee," see Statement of Organization, filed with FEC, May 15, 1980, as required by law, 2 U.S.C. § 434(e)(5) (1982); 11 C.F.R. § 102.14(c) (1985).

⁷⁷ 2 U.S.C. §§ 441b(b)(2)(C), 441b(b)(4)(C) (1982). The fund "may be completely controlled" by MCFL, "whose officers may decide which political candidates contributions to the fund will be spent to assist." *NRWC*, 459 U.S. at 200 n.4.

In 1978, MCFL was a nonmembership corporation under its articles and by-laws. To make full use of its separate segregated fund,

money to be used in federal elections, those contributors would no doubt respond favorably to solicitations from a political committee affiliated with MCFL, bearing its name, and sharing its ideological goals. Alternatively, persons sharing MCFL's goals are free to establish a political committee unaffiliated with MCFL. Such a committee could not receive funds from MCFL for overhead expenses, but it would be permitted to solicit the general public (including MCFL members) for contributions. Since the organizational ties between MCFL and its contributors are relatively loose, no substantial associational values would be lost by the creation of such a separate committee.⁷⁸

MCFL claims that creating a "political committee" is burdensome because disclosure is required, and the court

MCFL changed its formal corporate structure in 1980 to become a membership corporation. Motion to Affirm at 11; Answer to FEC Interrogatories No. 6, 10 (D. Mass., May 6, 1982). In *NRWC*, this Court held that it is not unconstitutionally burdensome to limit solicitations by a nonstock corporation's separate segregated fund to persons who are members of the corporation under state law. 459 U.S. at 210.

⁷⁸ The record shows that MCFL obtained funds, *inter alia*, from individuals who attended MCFL's annual dinner, a fundraising event open to the general public, Deposition of Philip D. Moran at 71-72, 77-78 (Aug. 10, 1982), and from persons who designated a portion of their grocery bill to go to MCFL as their favorite charity in a promotional program at a local supermarket. *Id.* at 38-40. MCFL also raised funds through such activities as garage sales, cake sales, bike-a-thons, fashion shows, yard sales, dances, raffles, auctions, furniture sales, wine-tasting parties, flower sales, and cookbook sales. Affidavit of Philip D. Moran ¶ 8 (July 9, 1982). In 1978, when the expenditures at issue were made, none of MCFL's contributors had any right to vote for the board of directors, which was self-appointed and self-perpetuating. Deposition of Philip D. Moran at 25, 70. Compare *NRWC*, 459 U.S. at 206 ("Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no indication that *NRWC*'s asserted members exercise any control over the expenditure of their contributions.").

of appeals seems to have accepted this argument.⁷⁹ That is astonishing, because in *Buckley v. Valeo*, this Court endorsed the importance of disclosure requirements as a vital part of Congress' scheme of campaign finance regulation.⁸⁰ The small burden of disclosure is one that the Constitution permits because it serves compelling governmental interests.⁸¹

For these reasons, there should be no serious doubt about the constitutionality of section 441b as applied to MCFL. While drawing a clear line around all corporations and prohibiting them from making contributions and expenditures in connection with federal elections, section 441b allows ample scope for freedom of speech and association through organizations not using the corporate form. Moreover, the provision is a cornerstone of Congress' carefully designed scheme to protect the integrity of federal elections. To breach the ban on corporate contributions and expenditures would gravely weaken that edifice.

B. If There Are Doubts About the Constitutionality of Applying Section 441b to MCFL, Section 441b Could Be Construed To Exclude Organizations Such as MCFL.

If, nonetheless, there are constitutional doubts, surely those doubts are narrowly confined to corporations formed expressly for political purposes and lacking any corporate or labor union connections. The necessity of

⁷⁹ Motion to Affirm at 11; Juris. Statement 21a n.7 (court of appeals opinion). Disclosure requirements are not, of course, an additional burden imposed on MCFL by the application of section 441b; they are a constitutionally permissible incident of making "contributions" or "expenditures" through any institutional mechanism.

⁸⁰ The Court recognized that disclosure requirements might deter some persons from making contributions, but upheld their constitutionality except as applied to a group that could prove that compelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 68-74. MCFL has not attempted to make such a showing.

⁸¹ *Id.* at 60-68.

resolving those doubts could be pretermitted by reading into section 441b a narrow exception for political committees in corporate form that support federal candidates as well as advocating particular political positions. As the Court reaffirmed last Term, it "should 'not decide a constitutional question if there is some other ground upon which to dispose of the case.'" ⁸² In the unlikely event that the Court doubts the constitutionality of applying section 441b to MCFL, it might construe the statute to exclude entities such as MCFL.⁸³

Any such statutory exception should be tightly circumscribed. The history of electoral abuse in this area shows that incautious characterization of an exception might be exploited by those corporations and labor unions that Congress unquestionably intended to bar from campaign-related financial activity.⁸⁴ We therefore suggest that no

⁸² *Lowe v. SEC*, 105 S. Ct. 2557, 2563 (1985) (citations omitted); see *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). In order to avoid deciding constitutional questions, the Court has often interpreted broad Congressional language to exclude a particular application in the absence of any "clear expression of an affirmative intention of Congress" to the contrary. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504, 507 (1979), quoted in *United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982); see *CIO*, 335 U.S. at 120-24; *United States v. Rumely*, 345 U.S. 41, 45 (1953); *International Ass'n of Machinists v. Street*, 367 U.S. at 749; *Letter Carriers*, 413 U.S. at 571; *Buckley*, 424 U.S. at 78-81.

⁸³ Section 441b literally applies to "any corporation whatever." However, the legislative history of the 1907 Tillman Act indicates that the word "whatever" was included to make clear that the statute covers corporations organized under state laws, not merely national banks and corporations organized by authority of an Act of Congress. See S. Rep. No. 3056, 59th Cong., 1st Sess. 2 (1906) ("all corporations, no matter under what laws created"); H.R. Rep. No. 6397, 59th Cong., 2d Sess. 1 (1907); 41 Cong. Rec. 1452 (1907) ("any corporation whether organized under the Federal Government or under the State").

⁸⁴ For the reasons stated cogently by the court of appeals, which are amply supported by the legislative history, Juris. Statement 6a-19a, this Court should not rely on any of the three statutory grounds on which the district court relied. The district court's rea-

corporation should be excluded from the coverage of section 441b unless it satisfies each of the following criteria:⁸⁵

First, the corporation must be a not-for-profit corporation that does not engage in business or commercial transactions of any kind.⁸⁶ Second, the corporation must not have any shareholders or other affiliated persons with a claim to any of its assets or earnings.⁸⁷ Third, the corporation must not have been established by a business corporation or labor union and it must not accept contributions from business corporations, labor unions or other artificial entities, because Congress realized the danger that business corporations might use ostensibly nonbusiness corporations or other groups as conduits to spend money in connection with elections.⁸⁸

soning, if accepted, would create loopholes susceptible to widespread exploitation and abuse.

⁸⁵ If the Court were to conclude that section 441b is unconstitutional as applied to MCFL, it should apply the same criteria in defining the scope of its holding, and should in addition limit the holding to independent expenditures such as those involved in the Special Election Editions.

⁸⁶ See *supra* pp. 7-8. Activities such as bake sales and car washes would not be "business or commercial transactions" if they were expressly designated as political fundraising events, so that all contributors were fully aware of their political purpose.

⁸⁷ See *supra* pp. 8-9. Section 441b extends beyond stock corporations. 2 U.S.C. § 441b(b)(4)(C) (1982); see 122 Cong. Rec. 7197-98, 12468-69 (1976).

⁸⁸ See *supra* note 66 (discussing 1945 Senate investigative committee report and 1947 debates on Taft-Hartley Act). Senator Taft specifically stated that the National Association of Manufacturers and the United States Chamber of Commerce, which had corporate members, could not use treasury funds in federal election campaigns. 93 Cong. Rec. 6438 (1947). He also indicated that the Chamber of Commerce, if incorporated, could not lawfully spend money in federal elections even if that money had been raised from individuals. *Id.* at 6439. Since the Chamber of Commerce obtained corporate treasury funds from its corporate members, receiving individual contributions as well would not eliminate its status as a corporate conduit.

According to the Commission's brief in *NRWC*, "NRWC has admitted that it receives a portion of its treasury funds from con-

Fourth, the corporation must have been formed for the express purpose of promoting political or ideological positions, and its sole source of funds must be voluntary contributions from individuals who have been informed that the funds will be spent for campaign-related purposes. If this criterion is not satisfied, there is an undue risk that contributors' funds will be used for campaign-related purposes of which they do not approve, contrary to Congress' intent.⁸⁹

The Federal Election Commission has consistently taken the position that section 441b does not apply in one situation where all of these criteria are satisfied—the political committee that incorporates solely for liability purposes. In 1975, the Commission decided that, "[i]f a nonprofit organization is created expressly and exclusively to engage in political activities," and has incorporated for liability purposes only, "[t]hat type of corporation is essentially a political committee and may contribute its assets to Federal candidates the same as unincorporated political committees."⁹⁰ Although not

tributions from other corporations." Brief for Petitioners, *FEC v. NRWC*, at 37 (June 21, 1982). For this reason, *NRWC* would be covered even if section 441b excluded some other incorporated entities. Similarly, this criterion would exclude trade associations with corporate members.

⁸⁹ See *supra* pp. 8 to 9. This governmental interest supports Senator Taft's view that section 441b would prevent an incorporated church from making election-related contributions and expenditures. 93 Cong. Rec. 6440 (1947). Donors reasonably expect that their contributions to a church will be used for religious purposes, not to advocate the election or defeat of political candidates. Accordingly, Senator Taft's statement about churches does not inexorably lead to the FEC's conclusion that "Congress considered this purpose to apply fully to [all] non-profit corporations whose money comes from ideological adherents." *Juris.* Statement 19 n.15.

⁹⁰ Advisory Opinion 1975-16, 40 Fed. Reg. 36242, 36243 (1975). Accord Advisory Opinion 1975-37, 40 Fed. Reg. 42303 (1975). In a subsequent advisory letter, the Commission stated that "this conclusion is premised on the assumption that all receipts and disburse-

constitutionally necessary, it is a reasonable interpretation of the statute. Absent a congressional finding that a risk of abuse exists, the Commission is reasonable in declining to insist that a political committee that decides to incorporate thereby disqualifies itself from performing the activities for which it was created.⁹¹ The Court could, if so impelled by constitutional concerns, broaden that exception solely to encompass organizations in corporate form that have other political or ideological activities in addition to electoral activities, and that meet the four criteria outlined above.⁹²

C. If MCFL Is Excluded from Section 441b, Then It Is a "Political Committee" Subject to the Federal Election Campaign Act.

If the Court decides that a narrow statutory exception to section 441b does exist, it should also make clear that corporations within that exception are "political committees" subject to the Federal Election Campaign Act ("FECA"). Under the FECA, a "political committee" is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."⁹³ This language applies to all types of or-

ments relating to all the [group's] varied activities will be regarded as though they were contributions and expenditures under the Act." Response to Advisory Opinion Request 1975-122, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 6020 (Sept. 2, 1976). See 11 C.F.R. § 114.12(a) (1985).

⁹¹ See *NCPAC*, 105 S. Ct. at 1465, 1468 (appellees NCPAC and FCM were incorporated political committees, but the case was "not a 'corporations' case").

⁹² MCFL might satisfy these criteria. See *Juris*, Statement 22a-23a (court of appeals opinion); *id.* at 26a (district court opinion) (describing MCFL's Statement of Purpose). MCFL asserts that it has a policy against accepting contributions from business corporations. Motion to Affirm at 2; Deposition of Philip D. Moran at 74-75.

⁹³ 2 U.S.C. § 431(4)(A) (1982); 11 C.F.R. § 100.5(a) (1985).

ganizations that are not forbidden by law from participating in federal elections. MCFL is an "association, or other group of persons" and it made expenditures of \$9,812 in 1978 to support and oppose federal candidates in the Massachusetts primary election.⁹⁴ Therefore, it was a "political committee," unless it was a corporation forbidden to make those expenditures at all.⁹⁵

In *Buckley*, this Court suggested that the definition of "political committee" should be construed to exclude "groups engaged purely in issue discussion";⁹⁶ but MCFL did not limit itself to "issue discussion." The courts below found that MCFL spent considerably more than the statutory threshold amount to print and distribute approximately 100,000 copies of a leaflet that supported the election or defeat of particular federal candidates.⁹⁷

Buckley also suggested that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."⁹⁸ That case, however, did not present to the Court the question whether "political committee" should be construed so narrowly that certain corporations could avoid section 441b and at the same time escape the FECA's disclosure requirements and contribution limits.⁹⁹ The Court's discussion in *Buck-*

⁹⁴ See *Juris*, Statement 5a, 19a (court of appeals opinion).

⁹⁵ To inform the public, to deter corruption, and to facilitate enforcement of the law, political committees are required to register with the Federal Election Commission, to submit periodic reports, and to maintain records of receipts and disbursements. 2 U.S.C. § 432, 433, 434 (1982). In addition, political committees may receive no more than \$5,000 from any individual in a calendar year. *Id.* § 441a(a)(1)(C).

⁹⁶ 424 U.S. at 79.

⁹⁷ *Juris*, Statement 18a n.6 (court of appeals opinion).

⁹⁸ 424 U.S. at 79.

⁹⁹ Unlike this case, the two lower court decisions cited by the Court did not involve express advocacy of the election or defeat of

ley cannot facilely be taken from its context as a predicate for freeing MCFL from the statutory requirements applicable to political committees.

MCFL cannot have it both ways. Either it is prohibited under section 441b from direct involvement in federal elections; or, if not, it must abide by the FECA disclosure requirements and contribution limits that this Court has upheld as essential to the integrity of the political process.¹⁰⁰ A corporation may not invoke its political purposes to justify its participation in the electoral process, notwithstanding section 441b, and then undermine the statutory scheme by obtaining hidden or unlimited contributions and making secret expenditures in connection with federal elections.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

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specific candidates. See *ACLU, Inc. v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (3-judge court), vacated as moot, 422 U.S. 1030 (1975); *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

¹⁰⁰ *Buckley*, 424 U.S. at 23-38, 60-69.

(7)
No. 85-701

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS; ASSOCIATED PRESS
MANAGING EDITORS; NATIONAL ASSOCIATION
OF BROADCASTERS; THE NEWSPAPER GUILD;
PUBLIC BROADCASTING SERVICE; RADIO-
TELEVISION NEWS DIRECTORS ASSOCIATION
AND THE SOCIETY OF PROFESSIONAL
JOURNALISTS, SIGMA DELTA CHI
AS AMICI CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-701

FEDERAL ELECTION COMMISSION, Appellant

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellee

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Brief of the Reporters Committee
for Freedom of the Press;
Associated Press Managing Editors;
National Association of Broadcasters;
The Newspaper Guild; Public Broadcasting
Service; Radio-Television News Directors
Association; and the Society of
Professional Journalists, Sigma Delta Chi
as Amici Curiae

INTEREST OF THE AMICI CURIAE

The news organizations filing this brief are not parties to this action but they have a vital First Amendment interest in the outcome of this litigation.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The Associated Press Managing Editors (APME) is a separate membership organization which includes more than 800 editors of newspaper members of The

Associated Press, which gathers news worldwide for dissemination to 1,500 newspapers and 5,700 broadcast stations in the United States.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit, incorporated association of radio and television broadcasting stations and networks. NAB membership includes more than 4500 radio stations, 900 television stations, and the major commercial networks.

The Newspaper Guild is an unincorporated trade union representing some 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada and Puerto Rico, and has been active in protecting the First Amendment rights of its members and all Americans.

The Public Broadcasting Service

(PBS) is a non-profit, membership corporation, the members of which are licensees of non-commercial, educational television stations. PBS's members produce a significant body of news, public affairs, and documentary programming both for their own local broadcast and for national distribution by PBS. As part of its mission to promote discussion of public issues and events, public television has developed diverse, often experimental program formats in addition to the more conventional forms of television journalism. PBS has a vital interest in insuring that the FEC's rules encourage, in both form and substance, the broadest range of journalistic expression.

The Radio-Television News Directors Association (RTNDA) is a professional organization of more than 2,000 news

directors and others who are active in the supervising, reporting, and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 24,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States.

The amici curiae believe that this case represents an attempt by the Federal Election Commission to exercise jurisdiction over a publication merely because it has published partisan political commentary. Because of their devotion to protecting the First Amendment rights of all publishers,

whether they publish political material or not, each of the amici has a strong interest in the outcome of this litigation.

Amici have requested and received consent to file this brief from appellant and from appellee. Their letters of consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Massachusetts Citizens for Life, Inc. (MCFL) is a non-profit corporation formed primarily to oppose legalized abortion. Since its beginning in 1973, it has published a newsletter on a fairly regular basis. MCFL has also printed special editions in conjunction with major elections to inform voters of the candidates' stands on pro-life issues.

In September 1978, MCFL published its Special Election Edition with tabulations of questionnaire results and voting records on pro-life issues of 442 state and 50 federal candidates. The edition contained photographs of some of the pro-life candidates and urged readers to "vote pro-life." Soon after, MCFL published a supplement to correct

minor errors in the Special Election Edition.

Acting on a complaint, the Federal Election Commission (FEC) began an investigation in May 1979 to determine if MCFL's Special Election Edition was a violation of Section 441b(a) of the Federal Election Campaign Act (FECA), which prohibits "any corporation whatever" from making any contribution or expenditure to any candidate for federal election from its general treasury funds. The FEC initiated an action in March 1982, alleging that the MCFL had violated that provision.

The District Court, in granting summary judgment to MCFL, found that Section 441b(a) did not apply to the Special Election Edition because it was not an expenditure "to any candidate" as defined in Section 441b(b)(2), and

because it was distributed through the facilities of a periodical publication, qualifying it for the news exemption to the statute set out in Section 431(9)(B)(i).

The District Court also held that if Section 441b(a) was meant to apply to the Special Election Edition, it was an unconstitutional abridgement of MCFL's freedoms of speech, press, and association under the First Amendment.

The Court of Appeals found that Section 441b(a) was meant to apply to MCFL's Special Election Edition, but agreed with the District Court that the statute was unconstitutional as applied to a publication by a non-profit ideological corporation such as MCFL.

The FEC filed this appeal on October 25, 1985. This Court noted probable jurisdiction on January 13, 1986.

SUMMARY OF ARGUMENT

Section 431(9)(A)(i) of the Federal Election Campaign Act (FECA) contains a broad, general definition of "expenditure," which includes the spending of "anything of value . . . for the purpose of influencing" any federal election.

Section 441b, which governs corporate expenditures, includes a narrower definition which requires that the value be given "to" a candidate. Section 431(9)(B)(v) specifically excludes corporations from the broader definition.

Publication by MCFL of the Special Election Edition was not coordinated in any way with any candidate. It was thus not an expenditure "to any candidate," and therefore is not a prohibited

expenditure under Section 441b(a).

The FECA also exempts from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any . . . periodical publication." MCFL's regular newsletter is a periodical publication, and the Special Election Edition was distributed through its facilities. Although the election editions themselves, published at regular intervals, are arguably periodical publications, it is not necessary that they be periodical publications to satisfy the statute, but only that they be distributed through the facilities of one.

It is not relevant under the news exemption that the Special Election Edition had a larger circulation than the regular newsletter, nor is it

relevant that its staff differed from the regular newsletter staff.

Special editions more easily qualify as "news, commentary, or editorial" under the news exemption than do the subscription solicitation efforts found to be within the exemption in two district court cases that have addressed the issue.

If Section 441b(a) is found to apply to the Special Election Edition, its application in this case to a non-profit ideological corporation is a violation of MCFL's First Amendment freedoms of speech, press, and association.

The Special Election Edition, which contained news and commentary on the abortion issue, is political speech, and is therefore entitled to the fullest First Amendment protection. The fact that MCFL is a corporation is not

sufficient to divest it of this protection, for this would deprive its members of their freedom of association. Pooling of resources, in corporate or other form, is a valid way for persons of modest means and similar beliefs to amplify their message to the public.

Although this Court has not decided the constitutionality of restrictions on independent expenditures by corporations, it found in FEC v. National Conservative Political Action Committee (NCPAC), 105 S.Ct. 1459 (1985), that a limitation on expenditures by a political action committee in support of a candidate was unconstitutional because there was no compelling government interest justifying such a regulation. A non-profit, ideological corporation,

like a PAC, exists primarily to amplify a political message, and its form of organization is not likely to lead to corrupt election practices. As in NCPAC, no showing of a substantial government interest has been made, so this restriction of MCFL's First Amendment rights is unconstitutional.

A finding that Section 441b(a) is unconstitutional as applied to a publication by a non-profit ideological corporation is consistent with this Court's holding in FEC v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), which held that the FECA's limitations on solicitation of funds by a corporation for its political committee were valid. Although NRWC's corporate status was an important factor in that case, more important was the fact that the restriction applied to

corporate contributions to candidates, which are of a different constitutional stature than expenditures by a corporation to propagate views on an issue of public interest.

Section 441b(a) is a content-based prior restraint on MCFL's speech, and therefore carries a presumption of invalidity. Such a restraint can only be justified by a showing of a compelling government interest. The existence of an alternative means of expression does not justify the elimination of the most simple one.

The FEC has not shown that the Special Election Edition had any tendency to corrupt elections or cause the appearance of corruption, which is the only compelling government interest recognized by this Court sufficient to justify regulation of campaign finances

and the accompanying infringement on First Amendment rights. Nor has the FEC shown that the publication was in any way inconsistent with the goals of MCFL's contributors.

The standard of review is rigorous when First Amendment freedoms are at issue. The FEC has failed to demonstrate any government interest sufficient to justify a prior restraint on a publication by a non-profit, issue-oriented corporation.

ARGUMENT

- I. PUBLICATION OF THE SPECIAL ELECTION EDITION BY MCFL WAS NOT A "CONTRIBUTION OR EXPENDITURE" MADE "TO ANY CANDIDATE . . . IN CONNECTION WITH ANY ELECTION" AS DEFINED IN FECA SECTION 441b(b)(2).

Section 441b(b)(2), of the FECA, in defining the scope of the contributions and expenditures prohibited for corporations under Section 441b(a), states:

For the purpose of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election . . . (emphasis added).

In contrast, in the FECA's general definitions, Section 431(9)(A)(i) provides that the term "expenditure" includes:

any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any [federal] election . . . (emphasis added).

However, Section 431 (9)(B)(v) states that the definition of "expenditure" does not include:

any payment made or obligation incurred by a corporation or labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization

The Section 431 definition is clearly broader, as it does not require that the expenditure go to a candidate, but only that it have the purpose of influencing the election. Yet Section 431 includes a specific exclusion from

its greater breadth for corporations and labor organizations covered under Section 441b, stating that the definition of "expenditure" for those organizations is no broader than the 441b(b) definition.

The Court of Appeals erroneously interpreted Section 431(9)(B)(v) as providing "only that the definition of 'expenditure' with regard to individual contributions shall be no broader than the definition with regard to corporate contributions" (emphasis added). Section 431(9)(B)(v) clearly addresses expenditures by corporations and unions, and not by individuals. Therefore, it does not equate the general definition of "expenditure" with the Section 441b(b) definition, as interpreted by the Court of Appeals, but instead excepts corporations and unions from the

application of the broader definition.

The fact that the Section 441b(b) definition, like the Section 431(9)(A)(i) general definition, uses the word "include" in defining the scope of the definition does, as the Court of Appeals said, indicate that each definition is non-exclusive. The non-exclusivity, however, applies in each section to the delineation of the types of assistance included within the definition. It does not change the fact that although this list is modified in the general definition by the broad language "for the purpose of influencing an election," it is qualified by the much narrower language "to any candidate" in the definition that applies to corporations and unions.

Massachusetts Citizens for Life (MCFL), as a corporation, is subject to

the 441b(b) definition of expenditure. While the expenses of producing MCFL's Special Election Edition might be seen as being "for the purpose of influencing an election," they were clearly not made "to any candidate," and therefore are not an "expenditures" under Section 441b.

II. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S FINDING THAT THE NEWS EXEMPTION OF THE FECA APPLIES TO MCFL'S SPECIAL ELECTION EDITION.

A. The News Exemption Of The FECA Should Be Broadly Interpreted.

Section 431(9)(B)(i) of the FECA (hereafter the "news exemption") states that the term "expenditure" does not include

any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

As found by the District Court, the legislative history of the provision indicates that Congress intended it to be interpreted broadly. The House of Representatives committee report stated:

it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association.

H.R. Rep No. 1239, 93d Cong., 2d Sess 4 (1974).

The District Court also found that the same report indicated that the amendment was intended to conform to pre-existing case law, including this Court's statement:

It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. It is unduly stretching language to say that members or stockholders are

unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests.

United States v. CIO, 335 U.S. 106, 113 (1948).

B. MCFL's Special Election Edition Falls Within The News Exemption.

At issue in this case are (1) whether or not the Special Election Edition was news, commentary, or editorial, and (2) whether or not it was distributed through the facilities of a periodical publication. It is not disputed that MCFL's facilities are not owned or controlled by any political party or candidate.

The Special Election Edition clearly included news. MCFL compiled voting records and questionnaire responses to

provide comprehensive data not readily available from other sources. The edition also contained editorial matter and commentary, urging its readers to advance the pro-life cause by supporting candidates who held similar pro-life views.

It is also clear that MCFL's newsletter is a periodical publication. The newsletter has been published since MCFL's founding in 1973, although it has occasionally missed issues due to financial difficulties. The District Court even found that the Special Election Editions themselves were periodical publications for purposes of the statute. This finding was not necessary, as the news exemption requires only that the news and editorial matter be "distributed through the facilities" of a periodical

publication. The Special Election Editions were certainly not, as the Court of Appeals found, published "sporadically" because they were published "only during federal election campaigns." To so argue would suggest that federal elections themselves are sporadic because they are only held in alternate years.

The Court of Appeals held that the Special Election Edition could not be considered to have been published under the facilities of a newsletter, even if the newsletter were found to be a periodical. The court emphasized that the circulation of the Special Election Edition was much larger than that of the regular newsletter. This is not relevant to the statutory requirements for the news exemption, nor are the facts that both the masthead and the

production staff of the Special Election Edition varied from that of the regular newsletter.

Contrary to the Court of Appeals' holding, special editions are normally published by many periodicals. They provide specialized information on various events and subjects of special interest to readers, and often carry larger circulations, different staff members, and variations from the format of the parent publication.

The news exemption has consistently received broad interpretation by courts. For example, the district court for the District of Columbia found that the news exemption applied to a newspaper's distribution of a letter soliciting subscriptions. FEC v. Phillips Publishing Co., 517 F.Supp. 1308, 1313 (D.D.C. 1981). Another

district court found that a tape produced to promote a magazine also fell within this exception. Reader's Digest Association v. FEC, 509 F.Supp. 1210 (S.D.N.Y. 1981). The Special Election Edition more easily qualifies both as a normal press function and as news and editorial matter than either of the previously mentioned examples. A special edition published by a periodical is not only a normal press function, but it is within the scope of the newsgathering and news disseminating part of its operation, which the news exemption is intended to cover.

III. THE COURT OF APPEALS PROPERLY HELD THAT APPLICATION OF SECTION 441b OF THE FEDERAL ELECTION CAMPAIGN ACT TO PREVENT PUBLICATION OF MCFL'S SPECIAL ELECTION EDITION IS A VIOLATION OF MCFL'S FREEDOMS OF SPEECH AND PRESS UNDER THE FIRST AMENDMENT.

A. MCFL's Special Election Edition Was Political Speech Entitled To Full First Amendment Protection.

Political speech, such as that engaged in by MCFL in the publication and distribution of its Special Election Edition in September 1978, is "at the core of the First Amendment." FEC v. National Conservative Political Action Committee (NCPAC), 105 S.Ct 1459, 1467 (1985). From the days of the founding of our country, it has been recognized that a free flow of political ideas is a cornerstone of our system of government. As Justice Brandeis stated in his concurrence in Whitney v. California, 274 U.S. 357 (1927):

Those who won our independence believed . . . that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. at 375

(Brandeis, J., concurring).

The main purpose of MCFL's publication is to put into the marketplace its views on an important and controversial political issue. Therefore, as political speech, it is entitled to the broadest First Amendment protection. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

The FEC argues that MCFL's corporate form justifies its intrusion on MCFL's members' First Amendment rights.

Although corporate form of organization might contribute to the establishment of a compelling government interest that might justify a restriction on the organization's freedom of speech, the fact that an organization is a corporation is not sufficient by itself to divest its political speech of First Amendment protection. As this Court stated in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978):

[Political speech is] indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted). The Court went on to say:

We thus find no support in the First or Fourteenth Amendment, or in the

decisions of this Court, for the proposition that speech that would otherwise be within the protection of the First Amendment loses that protection simply because its source is a corporation

Id. at 784.

To deprive a group of its First Amendment protection based on its form of organization endangers the First Amendment right of freedom of association of its members. FEC v. NCPAC, 105 S.Ct. at 1467. The Court in NCPAC further said:

To say that [the] collective action [of the PAC members] in pooling their resources to amplify their voices [in support of candidates] is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id. at 1468.

This Court in NCPAC declined to decide the constitutionality of restrictions on independent expenditures

by corporations. FEC v. NCPAC, 105 S.Ct. at 1468. The Court did find, however, that a provision of the Presidential Election Campaign Fund Act limiting independent expenditures by a PAC in support of a particular candidate to \$1000 violated the PAC's First Amendment rights because it furthered no compelling government interest. The same reasoning that the Court used in NCPAC leads to the conclusion that Section 441b of the Federal Election Campaign Act (FECA) is unconstitutional as applied to the Special Election Edition produced by MCFL, a non-profit ideological corporation.

Like PAC's, non-profit ideological corporations are "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify the voices of

their adherents.'" FEC v. NCPAC, 105 S.Ct. at 1465, quoting Buckley v. Valeo, 424 U.S. at 22. The cost of mass communication today makes it impossible for any but the most wealthy to effectively communicate ideas on an issue by his or her own means. The members of MCFL have perceived the corporate form to be the most effective means to express their collective views, and they use it to achieve the greatest impact with their ideas.

In differentiating NCPAC's speech from the "proxy speech" found to exist in California Medical Assn. v. FEC, 453 U.S. 182, 196 (1981), the Court went on to say that "the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."

FEC v. NCPAC, 105 U.S. at 1468. That MCFL's contributors agreed with its message is equally obvious.

The "vote pro-life" message in MCFL's Special Election Edition was a form of candidate support fundamentally different from that engaged in by PAC's. It is meant to influence voters to support the pro-life stance. Any advocacy for a particular candidate is incidental, and contingent on his or her support of the pro-life goals of MCFL. MCFL's contributors expressly support its attempts to educate and influence the public on pro-life issues. There is no reason to believe that this support does not encompass dissemination of information on the positions of candidates for federal office on these issues. Nor is there a reason to believe that contributors would object

to the inevitable implied or express support for candidates who hold pro-life views.

The FEC contends that the decision of the court below that non-profit ideological corporations are exempt on constitutional grounds from enforcement of FECA Section 441b cannot be reconciled with this Court's decision in FEC v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), which upheld a FECA provision that limited a corporation's solicitation of contributions for its political contribution fund to members of the corporation. Although it is true that the Court in NCPAC said that NRWC "turned on the special treatment historically afforded corporations," FEC v. NCPAC, 105 S.Ct. at 1468, that statement, when taken in context, in no way makes NRWC

inconsistent with the holding of the Court of Appeals in this case.

This Court's discussion in NCPAC of its holding in NRWC makes clear that although the decision did indeed turn on NRWC's corporate form, it did so only after the Court had determined NRWC's status with respect to another important distinction, which distinguishes it from this case. The restrictions upheld in NRWC applied to solicitation of funds for contributions to candidates, as opposed to the expenditures to publish views on a heavily debated political issue in this case, which were not coordinated with the candidates. The Court in NCPAC stated:

NRWC is consistent with this Court's earlier holding [in First National Bank of Boston v. Bellotti, 435 U.S. at 789-790] that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional

stature than corporate contributions to candidates.

PEC v. NCPAC, 105 S.Ct. at 1468. Expenditures not coordinated with a candidate are less likely to lead to actual or perceived corruption in an election than are contributions directly to a candidate.

B. Section 441b Is A Content-Based Prior Restraint On MCFL's Freedom Of Expression, And May Be Applied Only When Justified By A Showing Of A Compelling Government Interest.

Section 441b of the FECA was properly found by the Court of Appeals to be a prior restraint on political speech, considered to be the most drastic restraint on that First Amendment freedom. Near v. Minnesota, 283 U.S. 697, 713 (1931). Although such a statute is not unconstitutional per se, it is presumed to be, and the

government thus carries a heavy burden to justify such a restriction. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). Prior restraints are permitted only in exceptional cases, such as when speech is obscene, threatens military operations, or incites overthrow of the government. Near v. Minnesota, 283 U.S. at 716.

As the Court of Appeals noted, Section 441b does not affect the time, manner, or place of the political expression, but instead is based on its content. As this Court said in Police Department of Chicago v. Mosely, 408 U.S. 92, 98 (1972), "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and

wide-open.'" Id. at 96, quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

In this case, as in Bellotti, the speech that the government attempts to regulate is "intimately related to the process of governing," First National Bank of Boston v. Bellotti, 435 U.S. at 786, and therefore the government "may prevail only upon the showing of a subordinating interest which is compelling." Id., quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960). See also Pacific Gas and Electric Co. v. Public Utilities Commission of California, 54 U.S.L.W. 4149, 4154 (February 25, 1986).

The FEC's argument that Section 441b does not infringe on MCFL's First Amendment rights is not justified by the fact that alternative methods (such as

formation of a PAC) may be available to certain organizations seeking to produce the same speech. The administrative requirements for the formation and maintenance of a PAC could in many cases be sufficient to deter a small organization from forming the PAC, and thereby inhibit the organization's political speech.

As the Court of Appeals also correctly pointed out, the government's burden to justify the elimination of the simplest method is no less merely because an alternative, more burdensome means of producing the political speech is available. Cf. Linmark and Associates v. Willingboro, 431 U.S. 85, 93-94 (1977). In fact, given the well-recognized government interest in the maintenance of a "free flow of ideas," the First Amendment demands that

the simplest route to expression of political views be protected.

The FEC suggested that infringement on First Amendment freedoms should not decrease judicial deference to legislative judgment, quoting from a decision in which this Court stated that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." Columbia Broadcasting System (CBS) v. Democratic National Committee, 412 U.S. 94, 103 (1973). The FEC omitted the following passage, which immediately follows the language quoted above:

That is not to say we "defer" to the judgment of Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the

Constitution should we determine that the Commission had not fulfilled its task with appropriate sensitivity to the interests in free expression.

Id. at 103. A quote taken out of context does not change the heavy burden on the government to justify a prior restraint, especially one on protected political expression.

C. The FEC Has Not Shown A Compelling Government Interest In Restricting MCPL's Speech Through Application Of FECA Section 441b To MCPL's Special Election Edition.

The only compelling government interest recognized by this Court for restriction of campaign finances and the free speech interests inherently involved is protection against corruption or the appearance of corruption. FEC v. NCPAC, 105 S.Ct. at 1469. These interests were among the purposes for Section 441b asserted by

the FEC in FEC v. NRWC, 459 U.S. 197, 207-208.

This corruption or appearance of corruption generally takes the form of actual or perceived political debts created through large campaign contributions. Buckley v. Valeo, 424 U.S. at 26-27.

As discussed above, this Court has previously held that a corporation's expenditures to promote its views are on a different constitutional footing than corporate contributions to candidates. First National Bank of Boston v. Bellotti, 435 U.S. at 789-790. As the Court recognized in Buckley, the FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

Buckley v. Valeo, 424 U.S. at 23. The Court went on to explain:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that the expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id. at 47.

Here, as in NCPAC, there was no coordination of the expenditures with any of the candidates, and no chance of any type of quid pro quo arrangement. And, in fact, any additional copies above the normal circulation of newsletter that might have been distributed could have been counterproductive had they reached the hands of voters who oppose MCFL's views.

As the Court said in NCPAC, "groups and associations. . . designed expressly to participate in political debate are quite different from traditional corporations organized for economic gain." FEC v. NCPAC, 105 S.Ct. at 1470.^{1/} A non-profit, ideological corporation such as MCFL cannot create political "war chests" nor political debts through contributions. United States v. United Auto Workers, 352 U.S.

^{1/} Indeed, as Justice White wrote in Bellotti, "Undoubtedly, as this Court has recognized, see NAACP v. Button, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members . . . Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations organized for the purpose of making a profit." First National Bank of Boston v. Bellotti, 435 U.S. at 805. (White, J., dissenting).

567, 579 (1957). Nor will an ideological corporation wield disproportionate influence by means of money amassed through the advantages of corporate form. This type of corporation serves only to help express the views of its contributors more effectively and efficiently than the contributors could as individuals.

The FEC also asserted in NRWC, supra, that Section 441b is intended to protect the right of individuals who have paid money into a corporation to have their money used to support causes or candidates which they themselves do not support. This has not been previously recognized by this Court as a compelling government interest, but even if it were, it is clearly not present here, for, as previously noted, contributions to a corporation of this

type are predicated on support of its views. FEC v. NCPAC, 105 S.Ct. at 1468. The primary purpose of the Special Election Edition was to advocate a pro-life stance, and support of candidates was incidental.

The Court in NCPAC chose not to disturb the district court's finding that NCPAC's expenditures had caused no corruption because the finding was within that court's discretion. FEC v. NCPAC, 105 S.Ct. at 1470. In this case as well, the District Court correctly found that no corruption resulted from publication of the Special Election Edition. The same deference is thus fully justified.

As this Court has stated, when infringement of First Amendment freedoms is at issue, the standard of review is rigorous. FEC v. NCPAC, 105 S.Ct. at

1471. Although Section 441b's application to certain profit-making corporations may be justified, its applicability to MCPL's Special Election Edition, with no corresponding compelling government interest to justify it, makes it fatally overbroad, just as the statute limiting a PAC's independent expenditures in support of a candidate was invalidated for overbreadth in FEC v. NCPAC, 105 S.Ct. at 1470.

CONCLUSION

The FEC has attempted to contort the FECA's prohibition on corporate expenditures in general elections beyond its intended and allowable scope. The problems the statute was designed to alleviate -- specifically, corruption and the appearance of corruption -- are not implicated in the instant case.

The plain language of the statute, including its explicit exemption for legitimate news, makes it highly unlikely that Congress ever intended to prohibit publications such as MCPL's Special Election Edition. The primary purpose of the publication was to advocate a political view, and any advocacy of particular candidates was incidental. The expenditure could not possibly create the political debts

which Congress was trying to eliminate when it enacted the FECA.

If this Court should find that Congress did intend to prohibit this publication, the statute as applied by the FEC would be unconstitutional. A content-based prior restraint on MCPL's freedom of expression is presumptively unconstitutional. Only proof of a compelling government interest could justify such restrictions on the free expression of political ideology. The FEC has not proven, nor is it possible for it to prove, a government interest sufficient to prevent publication by a non-profit ideological corporation.

Accordingly, the decision of the Court of Appeals should be reversed as to the applicability of FECA Section 441b(a) to MCPL's Special Election

Edition, and affirmed as to its finding that the statute is unconstitutional as applied to that publication.

Respectfully submitted,



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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
Appellant,
v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

**BRIEF FOR THE NATIONAL RIFLE ASSOCIATION
OF AMERICA AS AMICUS CURIAE**

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FEDERAL ELECTION COMMISSION,

v. *Appellant,*

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellee.

On Appeal from the United States
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**BRIEF FOR THE NATIONAL RIFLE ASSOCIATION
OF AMERICA AS AMICUS CURIAE**

**INTEREST OF THE AMICUS
AND SUMMARY OF ARGUMENT**

Counsel for each party has consented to the filing of this brief, as indicated by letters filed with the Clerk of the Court. In its brief, NRA urges the Court to affirm the decision below.

NRA is a nonpartisan, nonprofit corporation of approximately three million members. First among its purposes is the defense of the Constitution of the United States, especially of the right of each law obedient American citizen to exercise the right to keep and bear arms, as guaranteed by the Second Amendment, in order that the people can exercise their individual rights of self-preservation and defense of family and property, as well as serve effectively in the appropriate militia for the defense of the Republic and the individual liberty of its citizens.

In support of this objective, the NRA and its political committee, a separate segregated fund within the meaning of the Federal Election Campaign Act, participate in federal elections by making contributions and expenditures to support candidates with whom the NRA agrees. The Federal Election Commission began a civil action against NRA and its committee in the United States District Court for the District of Columbia, alleging expenditures, which were in fact independent, in violation of 2 U.S.C. 441b. The parties have moved for summary judgment and a decision is awaited. The NRA has taken the position that 2 U.S.C. 441b does not forbid an independent expenditure and that, if it did, it would be unconstitutional in violation of the First Amendment.

SUMMARY OF ARGUMENT

1. Section 441b does not prohibit an independent expenditure by a corporation or labor organization since the definition of "contribution or expenditure," in that section, encompasses only direct and indirect payments to specified political entities. The statute, therefore, is "clear and unambiguous," and this Court should give effect to the unambiguously expressed intent of Congress in accordance with *Federal Reserve Board v. Dimension Financial*, 88 L.Ed.2d 691, 698 (1986).

2. The court below was incorrect in holding that the definition of "expenditure" in 2 U.S.C. 431(9)(A)(i) applies to Section 441b. The application of this and other definitions in 2 U.S.C. 431, including that of "person," to corporations and labor organizations, would permit corporations and labor organizations to make reportable contributions within the limits allowed by 2 U.S.C. 441a(a)(1). Nonetheless, even assuming that the section 431(9)(A)(i) definition applies, section 441b is not thereby made ambiguous since the definition in section 431(9)(A)(i) also does not include an independent expenditure within its scope. Because there is no ambi-

guity, there is no necessity to search the legislative history of section 441b to find whether it prohibits independent expenditures.

3. Section 441b is a penal statute, violations of which are punishable by 2 U.S.C. 437g(d). If, therefore, section 441b is regarded as ambiguous, it must be strictly construed and any ambiguity must be resolved in favor of lenity. This rule is applicable although criminal charges have not been brought against Massachusetts Citizens For Life, Inc., since it is a criminal statute the Court must interpret, and there cannot be one construction for the Federal Election Commission and another for the Department of Justice.

4. The legislative history of section 441b was thoroughly reviewed by this Court in *United States v. C.I.O.*, 335 U.S. 106 (1948), *United States v. U.A.W.*, 352 U.S. 567 (1957), and *Pipefitters v. United States*, 407 U.S. 385 (1972), and the opinions in those cases offer no support for the position that section 441b prohibits an independent expenditure and, in fact, prove otherwise. In any event, no corporation or labor organization should be subject to criminal charges on the basis of an ambiguous statute and an ambiguous legislative history. The Commission's remedy, therefore, is to ask Congress to amend section 441b.

5. If section 441b is construed to prohibit the independent expenditures at issue in this case, it would violate the First Amendment as applied. In *Buckley v. Valeo*, 424 U.S. 1 (1976), although this Court sustained limits on contributions, it found that the governmental interest in preventing corruption was inadequate to justify a ceiling on independent expenditures by individuals. The Court explained that the creation of political debt, and hence corruption, the only constitutionally sufficient justification, arises from contributions to candidates, not independent expenditures. This Court has also recog-

nized, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), that Congress has not demonstrated the existence of a danger of real or apparent corruption in independent expenditures by corporations. Moreover, a ban on independent expenditures by corporations would restrict the institutional press, whose communications are not entitled to greater constitutional protection than other corporations and which does not have a monopoly either on the First Amendment or the ability to enlighten.

ARGUMENT

I. SECTION 441b DOES NOT PROHIBIT AN INDEPENDENT EXPENDITURE BY A CORPORATION

Section 441b (J.S. App. 75a)¹ makes it unlawful for any corporation or labor organization to make a "contribution or expenditure" in connection with any federal election. The term "contribution or expenditure" is defined in section 441b(b) (2), in relevant part, to include:

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election . . . (Emphasis added).

It is obvious from a reading of this definition that it does not encompass an independent expenditure, which is defined, at 2 U.S.C. 431(17).² The definition of "con-

¹ "J.S. App." references are to the appendix in the jurisdictional statement filed by the Federal Election Commission.

² Section 431(17) provides:

"The term 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate."

tribution or expenditure" clearly confines itself to direct and indirect payments to specifically named political entities, i.e., "any candidate, campaign committee, or political party or organization . . ."³

An independent expenditure, however, excludes the possibility of its being received by "any candidate, campaign committee or political party or organization," since any payment to one of these entities could, of necessity, occur only with the cooperation of, and in concert with, the recipient "candidate, campaign committee or political party or organization." The essence of an independent expenditure is that it has no cooperating or consulting recipient, since such concert would convert an independent expenditure into an indirect contribution. In *Buckley v. Valeo*, 424 U.S. 1, 46 (1976), this Court affirmed that expenditures coordinated with the candidate are treated as contributions rather than independent expenditures, saying:

³ In *FEC v. National Right to Work Committee*, 459 U.S. 197, 199, n.1 (1982), this Court stated:

. . . The Federal Election Campaign Act of 1971 (Act) makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with" certain federal elections. 2 U.S.C. § 441b(a). The term "contribution" is defined broadly . . . to include any sort of transfer of money or services to various political entities . . . (Emphasis added).

This statement recognizes that a payment, to come within the definition of "contribution or expenditure" in section 441b, must be transferred to and received by one of the political entities named in the definition of "contribution or expenditure," i.e., "a candidate, campaign committee or political party or organization." Also, in *FEC v. National Conservative PAC*, 84 L.Ed.2d 455, 469 (1985), this Court noted that, in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), it considered "a rather intricate provision of the Federal Election Campaign Act dealing with the prohibition of corporate campaign contributions to political candidates . . ." (Emphasis added).

. . . controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.

Further, the fact that section 441b(a) specifically makes it unlawful "for any candidate, political committee, or other person knowingly to accept or receive" any contribution prohibited by the section, emphasizes that the payment prohibited is a direct or indirect *coordinated* contribution. Congress obviously wished to assure, since it took both donor and recipient to violate section 441b, that both should be punished.⁴ The recipient can obviously be only the beneficiary candidate or political committee, or person acting on behalf of either entity.

Since section 441b is clear and unambiguous in requiring a recipient, thus excluding an uncoordinated or independent expenditure, the teaching of *Federal Reserve Board v. Dimension Financial*, 88 L.Ed.2d 691, 698 (1986), applies:

If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

The Court also said:

The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. *Richards v.*

⁴ The contribution would not be complete unless accepted. There could, moreover, be no attempt to make a contribution which was rejected since there is no "attempt" provision in section 441b and there is no general attempt statute in the United States Code.

United States, 369 U.S. 1 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. 88 L.Ed.2d at 702.

II. SECTION 441b IS NOT AMBIGUOUS

Notwithstanding the plain language of section 441b, the court below found that section 441b was ambiguous, stating that the "presence of the word 'include' in section 441b leaves open the possibility that 'contribution or expenditure' could encompass more than payments to a candidate, campaign committee, or business organization." (J.S. App. 8a). (Emphasis in original). The court stated that "the plain language of the statute suggests that 'expenditure' . . . includes *but is not limited to* contributions to candidates, campaign committees, or political organizations." (App. 8a). (Emphasis in original). The court of appeals thus found applicable to section 441b the definition of expenditure in 2 U.S.C. 431 (9) (A) (i), which states:

The term "expenditure" includes—any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.

The effect of the specific definition of "contribution or expenditure" in section 441b(b) (2) may not be avoided,

however, by claiming that the definitions of "expenditure" in 2 U.S.C. 431(9)(A)(i) or of "contribution" in 2 U.S.C. 431(8)(A)(i)⁵ are also applicable to section 441b since, if those two section 431 definitions were considered applicable to the contribution activities of corporations and labor organizations, so would be the other definitions in section 431. In that event, the definition of *person* in 2 U.S.C. 431(11),⁶ which includes corporations and labor organizations, would also apply; thus, corporations and labor organizations would be permitted to make contributions to candidates and political committees up to the maximum amounts specified in 2 U.S.C. 441a(a)(1).⁷

This Court observed, however, in *California Medical Association v. F.E.C.*, 453 U.S. 182, 185, n. 2 (1981),

⁵ 2 U.S.C. 431(9)(A)(i) provides that the term "contribution" includes—"any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . ." If the reasoning of the court of appeals is correct, this definition of "contribution" would also be applicable to section 441b.

⁶ 2 U.S.C. 431(11) provides that the term "person" includes "an individual partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government."

⁷ 2 U.S.C. 441a(a) provides:

(1) No person shall make contributions—

- (a) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000;
- (b) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$20,000; or
- (c) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

that corporations and labor organizations are not governed by 2 U.S.C. 441a(a)(1), stating:

Section 441a(a)(1)(C) provides in pertinent part that "[n]o person shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed \$5,000." The Act defines the term "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." *Corporations and labor organizations*, however, are prohibited by 2 U.S.C. § 441b(a), from making any contributions to political committees other than the special segregated funds authorized by § 441b(b)(2)(C), and hence these entities *are not governed by § 441a(a)(1)(C)*. (Emphasis added).

This declaration makes it clear that, because of section 441b's prohibitions of contributions to various political entities, corporations cannot make such contributions to candidates and political committees up to the limits allowed by 2 U.S.C. 441a(a)(1). Thus, the definition of "person" in section 431(11), which would bring corporations within the ambit of 2 U.S.C. 441a(a)(1), does not apply to the contribution activities of corporations. It thus follows that, if the section 431(11) definition of "person" does not govern the contribution activities of corporations, then none of the section 431 definitions relating to contributions or expenditures apply to corporations. Application of the section 431 definitions of "contribution" and "expenditure" to corporations and labor organizations would also make applicable the reporting and disclosure provisions these definitions have been designed to implement, resulting in corporations and unions being freed from the prohibitions of section 441b. This is because the reporting and disclosure provisions of the Federal Election Campaign Act, including section 2 U.S.C. 431, define the "contribution" and "expenditure" activities which are *permitted* under the Federal Election Campaign Act so long as they are within

specified limits and reported, whereas section 441b prohibits certain narrowly defined conduct by corporations and labor organizations. Corporations and labor organizations are dealt with separately under section 441b precisely because their contribution activities are not permitted, defined, limited, and made reportable by the other provisions of the Federal Election Campaign Act.

Contrary to the conclusion of the court of appeals, application of the section 431(9)(A)(i) definition of expenditure to section 441b does not require a finding that the latter section is ambiguous, since the definition of "expenditure" in section 431(9)(A)(i) also does not include the concept of independent expenditure. When section 431(17) uses the term "expenditure" it obviously uses that term as it is defined in section 431(9)(A)(i), with the additional requirement that to come within the ambit of section 431(17) an expenditure must not be coordinated with a candidate or his committee or agent. The expenditure defined in section 431(9)(A)(i) must, of course, then be a *coordinated* expenditure. If this were not so, the definition in section 431(17) would be superfluous.

Since neither the definition in section 441b nor the definition in section 431(9)(A)(i) encompasses an uncoordinated or independent expenditure, there is no ambiguity in the statute and therefore no reason to resort to the legislative history of section 441b to determine whether it covers the independent expenditure activity of the Massachusetts Citizens For Life, Inc.⁸

⁸ Moreover, the court below misinterpreted the word "includes" in 2 U.S.C. 441b, stating that the presence of this word leaves open the possibility that "contribution or expenditure" could encompass more than payments to a candidate, campaign committee, or political entity because the word "includes" is usually a term of enlargement, not limitation. Whatever value that analysis may have in other contexts, it is not applicable to section 441b. Section 441b(b)(2), in defining "contribution or expenditure" uses the

III. SECTION 441b IS A PENAL STATUTE AND MUST BE CONSTRUED AS SUCH

Section 441b, if regarded as ambiguous, must be construed in favor of lenity, since it is a penal statute, violations of which are subject to punishment under 2 U.S.C. 437g(d).⁹

It has long been the rule that a criminal statute must be strictly construed and that any ambiguity must be resolved in favor of lenity. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Bass*, 404 U.S. 336, 347 (1971), *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *United States v. Boston & Maine RR*, 380 U.S. 157, 160 (1965), this Court said that the rule

word "includes" in defining what a "contribution or expenditure" is and then states specifically what the term "shall not include," by enumerating the activities set out in subsections (A), (B) and (C). (App. 76a-77a). If the statute did not specify what the term "contribution or expenditure" did not include, the reasoning of the First Circuit might be applied to reach the conclusion that the activities specified in subsections A, B, and C were encompassed by the definition of "contribution or expenditure." Congress, however, made the definition of "contribution or expenditure" in section 441b symmetrical, by specifying the activities which are included and those which are not.

Further, the authority cited by the First Circuit, *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968), as quoted by 2A N. Singer, *Sutherland Statutes and Statutory Construction* 133 (4th ed. 1984) is quite shaky. That case relied upon *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) which pointed out, at n.3, that it is not necessarily true that "includes" is a term of enlargement. *Gertz* in turn cited *Blankenship v. Western Union Telephone Co.*, 161 F.2d 168 (4th Cir. 1947), which regarded "includes" as a term of limitation, not enlargement.

⁹ 2 U.S.C. 437g(d) provides, in relevant part: "(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating \$2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both . . ."

requiring strict construction of criminal statutes was taught by the Court's cases from *United States v. Wiltberger*, 5 Wheat. 76, a case in which Chief Justice Marshall stated that "[t]he rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself." This Court in *Boston & Maine RR* also delivered a caution particularly applicable to the construction of section 441b:

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. *United States v. Weitzel*, 246 U.S. 533. [1918]. 380 U.S. at 160.

Weitzel, cited in *Boston & Maine RR*, mentioned another important principle which governs the construction of section 441b:

Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. 246 U.S. at 543.

Any attempt, moreover, to interpret section 441b as prohibiting independent expenditures "slights the wording of the statute." *United States v. Enmons*, at 399, *Williams v. United States*, 458 U.S. 279, 286 (1982). As this Court emphasized in *United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971), the actual wording of the statute should be controlling:

The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute. (Emphasis added).

Section 441b must be construed as a criminal statute despite the fact that criminal charges have not been brought against Massachusetts Citizens For Life, Inc.¹⁰

¹⁰ Criminal prosecutions are undertaken by the United States Department of Justice under section 441b, as is reflected, for exam-

In *Federal Communications Commission v. American Broadcasting Company, Inc., et al.*, 374 U.S. 284 (1953), this Court stated:

It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well established principle that penal statutes are to be construed strictly. 347 U.S. at 296. (Emphasis added).

The cases clearly suggest the impropriety of the Commission's attempt to ignore the definition of "contribution or expenditure" contained in 2 U.S.C. 441b(b) (2) and to expand the reach of this penal statute by resorting to legislative history. Despite this effort, however, section 441b remains a penal statute and must be construed as such.

IV. THE EVOLUTION OF THE PROHIBITION OF CORPORATE AND UNION CONTRIBUTIONS INDICATES SECTION 441b DOES NOT PROHIBIT INDEPENDENT EXPENDITURES

The prohibition of contributions to candidates by corporations and unions has been considered by this Court in *United States v. CIO*, 335 U.S. 106 (1948), *United States v. U.A.W.*, 352 U.S. 567 (1957) and *Pipefitters v. United States*, 407 U.S. 385 (1972). Each case dis-

ple, in Federal Election Commission Advisory Opinion 1984-52, dated November 30, 1984, which discussed a Grand Jury investigation in Chicago which led to criminal charges of illegal corporate contributions in violation of section 441b.

cussed the evolution of the prohibition and its legislative history. None of the cases completely resolved First Amendment questions, but each reflected this Court's sensitivity to the constitutional problems raised by restricting the speech of corporations and labor organizations.

United States v. CIO considered section 313 of the Federal Corrupt Practices Act of 1925, as amended by section 304 of the Labor Management Relations Act of 1947.¹¹

The case resulted from an indictment against the CIO, a labor organization, and its president, based on the publication and distribution of an issue of a periodical, *The CIO News*, published by the union from the funds of the union and with the consent of its president. The issue urged CIO members to vote for a particular Maryland candidate for Congress. This Court declined to decide whether section 313 abridged First Amendment free-

¹¹ Section 313 provided, in pertinent part:

"It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. . . ."

doms, concluding that the indictment did not charge acts embraced within the scope of section 313.

This Court pointed out that the indictment did not allege "the source of the CIO funds" (335 U.S. at 111) and stated:

The funds used may have been obtained from subscriptions of its readers or from portions of CIO membership dues, directly allocated by the members to pay for the "News," or from other general or special receipts.

We do not read the indictment as charging an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of "The CIO News," as members of the union. . . . We conclude that the indictment charges nothing more as to the extras than that extra copies of the "News" were published for distribution and were distributed in regular course to members or purchasers and that no allegation has been made of expenditures for "free" distribution of the paper to those not regularly entitled to receive it. 355 U.S. at 111.

This Court said that the construction of section 313 turned on the range of the word "expenditure" added by section 304 of the Labor Management Relations Act, finding that the word was *not* used as "a word of art" (335 U.S. at 112) and that the "applicability of the word to prohibition of particular acts must be determined from the circumstances surrounding its employment." (*Id.* at 112). This Court then reviewed the legislative antecedents of section 304, including the statute immediately preceding it, the War Labor Disputes Act of 1943. According to this Court, when Congress was considering the Labor Management Relations Act of 1947, it found a serious defect in the Federal Corrupt Practices Act, in that the word "contribution" was thought to be confined to *direct* gifts or direct payments. (*Id.* at 115). Congress therefore extended the prohibition of section 313

to "expenditures" since "it was obvious that the statute as construed could easily be circumvented through *indirect contributions*" (*Id.* at 115). (Emphasis added).

This Court, moreover, found in the Senate debates definite indication that Congress did not intend to include as an expenditure the costs of the publication described in the indictment.

This Court then reviewed the Senate debates relating to the Labor Management Relations Act of 1947, and observed:

If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality. In so far as some of the many statements made on the floor of Congress may indicate the thought, at the time, by certain members of Congress that the language of § 313 carried a restrictive meaning in conflict with that which we have adopted, we hold that the language itself, coupled with the dangers of unconstitutionality, supports the interpretation which we have placed upon it. *Id.* at 121-122.

This Court expressed the view that "expenditures" was added to eradicate the doubt that had been raised as to the reach of "contribution," *not to extend greatly the reach of the section.* (*Id.* at 122.) This Court did *not*, moreover, adopt the view it attributed to informed opponents and proponents that section 313 went so far as to forbid periodicals in the regular course of publication from taking part in pending elections where there was not segregated subscription, advertising, or sales monies adequate for its support. It also indicated that, although a periodical financed by a corporation or labor

union for the purpose of supporting candidates is on a different level from newspapers devoted solely to the dissemination of news, the line separating the two classes is not clear; and that, in the absence of a definite statutory demarcation, the location of that line must await the full development of facts in individual cases.

The Court explained:

It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication. . . . We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an "expenditure in connection with any election" of candidates for federal office intended to outlaw such a publication. 335 U.S. at 123. (Emphasis added).

This Court then specifically stated that it was unwilling to say that Congress, by its prohibition against corporations or labor organizations making "an expenditure in connection with any election" of candidates for federal office, intended to outlaw the publication with union funds of a regular periodical for the furtherance of the union's aims. 335 U.S. at 123. Obviously, the concept of "independent expenditure," as distinguished from "indirect contribution," had not been developed or articulated at the time of the *CIO* case. In fact, it cannot be assumed that attention had yet focused clearly on the concept of "indirect contribution." It is clear, however, that this Court did not approve an indictment which could be read as forbidding the publication of a newspaper by a union, using treasury funds, to express the views of the union in support of a candidate in a federal election.

This Court next examined the law forbidding the making of a "contribution or expenditure" by a union or

corporation in *United States v. U.A.W.*, 352 U.S. 567 (1957). The law was then codified in 18 U.S.C. 610 and read as it did when considered in *United States v. CIO*, except that language had been added to section 610 to provide a penalty for the recipient of a forbidden contribution or expenditure. In construing 18 U.S.C. 610, this Court again looked at its legislative history, particularly the amendment of section 313 of the Federal Corrupt Practices Act by the Labor Management Relations Act of 1947.

In *U.A.W.*, the union was charged with paying for television broadcasts endorsing the selection of certain persons to be candidates for Congress. The funds were alleged to have come from union dues, not voluntary political contributions. Speaking to the activity by the union, this Court observed:

To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations. As indicated by the reports of the Congressional Committee that investigated campaign expenditures, it was to embrace precisely the kind of *indirect contribution* alleged in the indictment that Congress amended § 313 to proscribe "expenditures". 352 U.S. at 585. (Emphasis added).¹²

¹² There is absolutely no reason to believe that the "indirect contribution" referred to by the Court is any different than the "controlled or coordinated expenditures" referred to in *Buckley v. Valeo*, 424 U.S. 1, 46, as being treated as contributions under the Federal Election Campaign Act, rather than as independent expenditures.

This Court distinguished *U.A.W.* from *United States v. CIO* by stating that, unlike the political broadcasts in the former case, the communication for which the defendants were indicated in *CIO* was neither directed nor delivered to the public at large. This Court thus stated:

The evil at which Congress has struck in § 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party. 352 U.S. at 589.

This Court held that the District Court committed error when it dismissed the indictment for having failed to state an offense under the statute. This Court, in allowing the prosecution to proceed, did not address the constitutional issues raised by the union, such as its rights under the First Amendment, stating that only an adjudication on the merits "can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *Id.* at 591. This Court explained that allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of truth. The questions left unanswered by the record were, according to this Court:

... was the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election? 352 U.S. 591.

This Court went no further than to decide that the indictment stated an offense when it charged that the spending of union treasury money was an expenditure of union funds, constituting an *indirect contribution* within the meaning of 18 U.S.C. 610. The type of "in-

direct contribution" this Court had in mind is illustrated by the following excerpt from this Court's quotation of Senator Taft's explanation of the amending of the statute to encompass expenditure as well as contribution within its meaning:

. . . If 'contribution' does not mean expenditure, then a candidate for office *could have his corporation friends* publish an advertisement for him in the newspapers every day for a month before election. . . . 352 U.S. at 583. (Emphasis added).¹³

It is thus clear that this Court was dealing with an expenditure made by the union *in cooperation with* the candidate and in accordance with his wishes.¹⁴ This Court went no further, therefore, than to decide that such an indirect contribution made to finance a communication to the general public was covered by section 610. Significantly, this Court did not list as one of the questions unanswered by the record, a question concerning whether there had been consultation or cooperation be-

¹³ The Commission, in its brief (p. 15) refers to a 1946 Report of the House Special Committee to Investigate Campaign Expenditures which recommended that the statute be clarified to provide that expenditures constitute violations, whether made with or without the knowledge or consent of candidates. Obviously, as shown by this statement of Senator Taft, the law was not so clarified when it was amended in 1947.

¹⁴ The Commission implies, by stating that "this Court determined long ago that the prohibition of corporate and union 'expenditures' was added to section 441b's predecessor in 1947 for the purpose of reaching expenditures in connection with federal elections that were claimed to be independent of a candidate's campaign" and then discussing *U.A.W.* (Brief of Appellant, at 14), that *U.A.W.* dealt with independent expenditures. Plainly, the Commission's view of *U.A.W.* is erroneous. Moreover, the Commission is wrong in suggesting that the key to the decision in *U.A.W.* was that the indictment "did not allege that the union's expenditures had been approved by or coordinated with any candidate." (Brief for Appellant, at 14) since the opinion contained no such discussion.

tween the union and the congressional candidates endorsed in the television broadcasts paid for by the union. This is no doubt because such coordination was assumed to have taken place as a natural consequence of the union's political support of a candidate. There is no basis for a belief that, at the time of the election covered by the indictment in *U.A.W.*, unions supporting candidates would make television broadcast decisions on their own. The concept of "independent expenditures" had not yet developed and there is no suggestion in *U.A.W.* that this Court in any way addressed it.

The court below stressed that, in *U.A.W.*, this Court found that the evil at which Congress aimed "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." (App. at 13a). This is not the critical issue, however, since communications to the public at large can be either uncoordinated or coordinated. It further stated:

We conclude that section 441b prohibits expenditures in connection with federal elections as well as expenditures made to candidates for federal office. (App. 15a).

Even this statement, of course, falls short of justifying its finding that the independent expenditures made in this case are proscribed, since "expenditures in connection with federal elections," can be coordinated expenditures. As this Court recently reaffirmed in *FEC v. National Conservative PAC*, 84 L.Ed.2d 455 (1985):

. . . "expenditures in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," are considered "contributions" under the FECA, 2 U.S.C. § 441a(a)(7)(B)(i), and as such are already subject to FECA's \$1,000 and \$5,000 limitations on §§ 441a(a)(1), (2). 84 L.Ed. 2d at 466-467.

This Court next construed 18 U.S.C. 610 in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) and held that section 610 does not apply to union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees. *Pipefitters*, however, in no way suggested that a corporation or union was prohibited from using general treasury funds to make an independent expenditure.

The term "contribution or expenditure," moreover, has not since been construed by this Court to cover the concept of an independent expenditure. *F.E.C. v. National Right To Work Committee*, 459 U.S. 197 (1982) contains absolutely no support for the Commission's position in this case. Like *Buckley v. Valeo*, *supra*, it merely affirmed "the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." 459 U.S. at 208. (Emphasis added). It did not suggest that an independent expenditure was prohibited by 2 U.S.C. 441b.

V. A PROHIBITION OF INDEPENDENT EXPENDITURES BY CORPORATIONS OR LABOR ORGANIZATIONS WOULD VIOLATE THE FIRST AMENDMENT

This Court instructed in *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) that the contribution and expenditure limitations of the Federal Election Campaign Act operate in an area of the most fundamental First Amendment activities, and that discussion and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476. . . . "there is practically universal agreement that a

major purpose of th[e] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . ." *Mills v. Alabama*, 384 U.S. 214 (1966).

This Court found it unnecessary, however, to look beyond the Act's primary purposes—to limit the actuality and appearance of corruption resulting from large individual financial contributions—to find a constitutionally sufficient justification for the \$1,000 contribution limitation contained in the Act. This Court also sustained the limitations on contributions by political committees and the \$25,000 limitation on total contributions during any calendar year, because these restraints prevent evasion of the individual contribution limitation. 424 U.S. at 35, 38.

This Court, nevertheless, found that the governmental interest in preventing corruption was inadequate to justify the ceiling on independent expenditures contained in the 1971 Act, stating:

the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in

stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. . . . Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. 424 U.S. at 46-48.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court considered a Massachusetts criminal statute that forbade certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals. The highest court of Massachusetts found the statute constitutional, holding that "only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public." 435 U.S. at 772. The Massachusetts Court had framed the issue in the case as whether and to what extent corporations have First Amendment rights. This Court said that the proper question is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons, but whether the Massachusetts law abridges expression that the First Amendment was meant to protect. It then held that the statute did abridge such expression, stating:

We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts

to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues, and a requirement that the speaker have a sufficiently greater interest in the subject to justify communication. 435 U.S. at 784.

This Court concluded that the Massachusetts law could not survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech and found it invalid because it prohibited protected speech in a manner unjustified by a compelling state interest. (*Id.* at 795).

Although this Court pointed out (435 U.S. at 787, n.26) that it was not dealing with a "challenge [to] the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections," it noted that the "overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts." The creation of a political debt is, of course, the problem which, in *Buckley v. Valeo*, *supra*, this Court found arises as a result of contributions to candidates. This Court specifically found in that case that independent expenditures create no such problem. In fact, independent expenditures may very well be unwelcomed by some candidates in an election and, in any event, cannot be viewed as capable of creating a political debt, which could only come into existence if an expenditure were made with the consent of or in coordination with the candidate. In such a case, of course, the expenditure would not be independent but would constitute a contribution. It therefore appears that this Court, when it rejected the limitation on individual independent expenditures in *Buckley*, effectively decided that only contributions are capable of creating political debts.

It is true that this Court left the door open should Congress wish to prohibit corporate independent expenditures and feel itself "able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U.S. at 787, n.26. Such a showing of corruption would be extremely difficult, however, not only because the expenditures in question are made without the permission of candidates, but also because of the effect a ban on independent expenditures would have on the institutional press. This Court in *Bellotti* refused to adopt the suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by banks and business corporations, pointing out that the press does not have a monopoly on either the First Amendment or the ability to enlighten. 435 U.S. at 782. Moreover, in an instructive concurring opinion, Chief Justice Burger emphasized "the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as appellants" in *Bellotti*. 435 U.S. at 796.

In *FEC v. National Conservative PAC*, 84 L.Ed.2d 455 (1985), this Court recently considered independent expenditures in the context of 26 U.S.C. 9012(f), which makes it a criminal offense for political committees to make *independent expenditures* in support of a Presidential candidate who has elected to accept public financing. This Court, quoting from *Buckley v. Valeo*, 424 U.S. 1, 14 (1974) affirmed that "[t]here can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment." 85 L.Ed.2d at 467. It also stressed that First Amendment freedom of association was "squarely implicated" in the case. *Id.* at 468.

This Court also stated that it did not need to reach "the question whether a corporation can constitutionally

be restricted in making independent expenditures to influence elections for public office" (*Id.* at 469), pointing out that, although appellees National Conservative Political Action Committee and Fund For A Conservative Majority were formally incorporated, "this is not a 'corporations' case." *Id.* at 469. This Court did, however, hold that the expenditures by these incorporated committees were entitled to full First Amendment protection and found § 9012(f)'s limitation on independent expenditures by political committees to be "constitutionally infirm". *Id.* at 470.

This Court emphasized that, in *Buckley v. Valeo*, it struck down FECA's limitations on individuals' independent expenditures because it found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption. This Court repeated what it concluded in *Buckley*, that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.* at 470.

This Court also stated:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will

be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more. *Id.* at 471.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,

v.

Appellant,

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
IN SUPPORT OF THE APPELLEE**

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IN THE
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OCTOBER TERM, 1985

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FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States
Court of Appeals for the First Circuit

**MOTION OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES FOR LEAVE TO
FILE BRIEF AMICUS CURIAE**

The Chamber of Commerce of the United States of America ("Chamber") hereby moves pursuant to Supreme Court Rule 36.2 for leave to file the attached brief *amicus curiae* in support of the appellee.¹ The Chamber is the nation's largest federation of businesses, trade and professional associations, and state and local chambers of commerce. The Chamber's membership con-

¹ This motion is necessitated by the refusal of the appellant, Federal Election Commission, to consent to the filing of this brief. The appellee, Massachusetts Citizens for Life, Inc., has consented to the filing of the brief.

sists of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber's *raison d'être* is the representation of its members' interests before the legislative, executive, and judicial branches of the government. With regard to the latter, the Chamber has represented its members' interests in numerous cases before this and other courts, including cases involving First Amendment rights.²

In furtherance of its members' interests, the Chamber is also heavily involved in other aspects of the federal political process. As more fully explained in its brief, the Chamber has for many years published voting records similar in many respects to those at issue in the instant case. Partially as a result of advice received from the Federal Election Commission ("FEC") that using Chamber funds to distribute these voting records to individuals who were not members of the Chamber would violate 2 U.S.C. § 441b, the Chamber formed its own separate segregated fund, the National Chamber Alliance for Politics ("NCAP").³

² See, e.g., *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Martin Tractor Co. v. FEC*, 460 F. Supp. 1017 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (D.C. Cir.), *cert. denied sub nom. National Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980).

³ The manner in which the separate segregated fund of a trade association, such as NCAP, may solicit funds is severely restricted by the Federal Election Campaign Act and its implementing regulations. These restrictions were challenged by the Chamber's litigation affiliate in *Bread Political Action Comm. v. FEC*, 635 F.2d 621 (7th Cir. 1980), *rev'd and remanded on procedural grounds*, 455 U.S. 577 (1982), *remanded to district court*, 678 F.2d 46 (7th Cir. 1982), *complaint withdrawn*, No. 77-C-947 (N.D. Ill. Feb. 1, 1983).

The Chamber, itself, therefore, has been restricted by the same statutory provisions at issue here, in a manner similar to that of the Massachusetts Citizens for Life. The Chamber believes it is important for this Court, in determining whether the restrictions imposed by the FEC on distribution of voting records are constitutionally permissible, to understand the numerous factual contexts in which these restrictions are being imposed. Accordingly, the brief appended hereto explains the Chamber's own personal experience with the restrictions imposed by the FEC on the distribution of voting records. For these reasons, the Chamber respectfully requests that its motion for leave to file a brief *amicus curiae* be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-791

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

**On Appeal from the United States
Court of Appeals for the First Circuit**

**BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
IN SUPPORT OF THE APPELLEE**

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. As a non-profit, tax-exempt corporation, the Chamber depends primarily on its members' voluntary dues for operating revenue.

The Chamber's primary purpose is the representation of its members' interests at all levels of the federal political process. In this regard, the Chamber takes positions on numerous legislative issues pending before the Congress. The Chamber urges Congress to adopt its position by presenting direct testimony before congressional committees, employing registered lobbyists, and urging its members to persuade their Senators and Representatives to adopt the Chamber's views. The Chamber acts in a similar manner in urging the Executive Branch to adopt policy and regulatory positions favorable to its membership.¹ In carrying out its functions, the Chamber utilizes the full gamut of communication tools, including television and radio.

In view of the Chamber's federal policy-making activities, it is not surprising that many years ago it began compiling and publishing voting records of incumbent members of Congress.² These voting records contain a score based on each member's overall votes on issues important to the Chamber. They were initially distributed to both Chamber members and the public. The similarity of the Chamber's activities to those of the appellant, Massachusetts Citizens for Life, Inc. ("MCFL") is, therefore, obvious.

In 1976 and 1977, however, the Federal Election Commission ("FEC") issued two advisory opinions which caused the Chamber to terminate all free distribution of its voting records to non-members of the Chamber. These opinions stated that the Chamber's voting records were partisan political communications and therefore distribu-

¹ As evidenced by the filing of this brief, the Chamber also actively represents its members' interests before the courts through the activities of an affiliated organization, the National Chamber Litigation Center, Inc.

² The Chamber's publication and distribution of voting records and the Federal Election Commission's restriction of the distribution of those records is discussed in much greater detail, *infra*.

tion to the general public violated 2 U.S.C. § 441b. They are premised on the same legal theory underlying the FEC's position in the instant case.

It is clear that the FEC's restrictions strike at the very heart of the Chamber's activities: its ability to communicate openly and freely on the policy positions taken by members of Congress. The Chamber believes that the restrictions imposed by the FEC seriously impede its First Amendment rights. It is for this reason that the Chamber submits this brief *amicus curiae*.³

STATEMENT OF THE CASE

This federal campaign expenditure case arises out of an enforcement action filed by the FEC against the Massachusetts Citizens for Life, a non-profit, issue-oriented corporation, for distributing two "Special Election Editions" of its newsletter to the general public in violation of § 441b of the Federal Election Campaign Act of 1971 ("FECA"), as amended. 2 U.S.C. § 441b. Section 441b prohibits corporations from using general treasury funds to make a contribution or expenditure in connection with a federal election.

The FEC charged that MCFL's publications were illegal campaign expenditures under § 441b and that distribution outside its membership should have been financed through a separate segregated fund pursuant to § 441b (b) (2) (B) of the Act. The U.S. District Court for the District of Massachusetts disagreed that the expenditures were prohibited,⁴ and, in the alternative, held that

³ The FEC's interpretation of § 441b also severely impacts many of the Chamber's association and state and local chamber of commerce members who are involved in activities similar to that of the U.S. Chamber and the MCFL.

⁴ The District Court held that the publications did not constitute § 441b expenditures because they were (1) "uninvited by any candidate and uncoordinated with any campaign" (*i.e.*, independent

any prohibition on publication and distribution would violate MCFL's First Amendment rights. The U.S. Court of Appeals for the First Circuit affirmed on constitutional grounds. 769 F.2d 13 (1st Cir. 1985). It found that § 441b was a "content-based restriction of expression," which was not justified by the governmental interests cited by the FEC, and held that "the application of § 441b to indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights." 769 F.2d at 23. The FEC appealed, and this Court noted probable jurisdiction.

ARGUMENT

I. THE CHAMBER'S EXPERIENCE WITH FEC RESTRICTIONS ON THE DISTRIBUTION OF VOTING RECORDS

A. How They Voted

Since 1966, the Chamber has published *How They Voted*, which is its own rating of incumbent Members of Congress. The Vice President for Legislative Affairs and his staff are responsible for the selection of issues upon which the evaluations are made.

How They Voted offers a representative sampling of floor votes taken on issues important to the business community. The votes of each Senator and Representative on these issues are listed, either as a "Right" vote, supporting the Chamber's position, or a "Wrong" vote, contrary to the Chamber's position. The percentage of right votes out of the total number of votes cast by that Member on Chamber selected issues during that session is presented. Also shown is the cumulative percentage of

expenditures) and (2) covered by the newspaper exemption from the definition of expenditure in § 431(9)(B)(i) of FECA. *FEC v. MCFL*, 589 F. Supp. 646 (D. Mass. 1984).

right votes out of the total number of votes cast by that member on Chamber selected issues.

How They Voted is published on a regular basis, whether or not it is an election year. All Members of Congress are listed, whether or not they are candidates for Federal office, and no mention is made as to the candidacy of any particular member. The ratings are not prepared in cooperation or conjunction with any candidate for Federal office; they are independently assembled by the U.S. Chamber.

How They Voted was offered as a special supplement in *Congressional Action*, a publication produced by the Chamber's legislative department and devoted exclusively to an analysis and review of pending legislation of interest to Chamber members, and both individual copies and bulk quantities of reprints of this special supplement were sold to Chamber members and the general public. Copies were also provided to members of the general public at no charge. At present, however, as a result of the FEC's interpretation of § 441b, members of the general public who wish to receive *How They Voted* are charged for their copies. *How They Voted* is currently published in *The Business Advocate*, a Chamber membership publication, after the conclusion of each session of Congress.

B. They Grade the Congress

Complementing *How They Voted*, the Chamber began publishing *They Grade the Congress* in 1969, which, in its original form, was a compilation of the "ratings" given to incumbent Members of Congress by various organizations, including the Committee on Political Education (COPE) (the political action arm of the AFL-CIO), Americans for Constitutional Action, and Americans for Democratic Action. More recently, the Chamber's own ratings as published in *How They Voted* have also been included in *They Grade the Congress*.

They Grade the Congress has been made available in four ways over the years. First, it was published on a one-time basis as a special supplement to the Chamber's weekly *Congressional Action*. Second, it was published on an annual basis in *The Business Advocate*, a monthly publication which also analyzes and reviews pending legislation, as well as other issues of interest to Chamber members. Third, *They Grade the Congress* was offered for sale to both members of the Chamber and the general public. Both individual copies and bulk quantities for further distribution were sold. Fourth, and finally, on a selected basis, single copies were provided at no charge to members of the general public. This method of distribution was terminated in 1976.

C. The Litchfield Letter

The Chamber's ratings were from time to time reprinted in whole or in part by other organizations, including corporations and trade associations, and by the general news media, especially in publications which report on legislative and political developments in Washington, D.C. As a result, *How They Voted* was widely disseminated both directly by the Chamber and through other institutions.

In its September 1976 issue, *Reader's Digest* magazine noted in a brief article that *How They Voted* was available from the Chamber upon request at no charge. In response to this article, the Chamber received more than 1,000 requests for this publication from individuals, the majority of whom were not Chamber members. The Chamber believed that the Supreme Court's dispositive treatment of § 608(e) of the 1974 amendments to the Federal Election Campaign Act in *Buckley v. Valeo*, 424 U.S. 1, 45-47 (1976), as well as the decisions of other federal courts in *Schwartz v. Romnes*, 357 F. Supp. 30 (S.D.N.Y. 1973); *United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972), and *ACLU v. Jennings*, 366 F. Supp. 104 (D.D.C. 1976), re-

solved any question of the permissibility of such distribution in favor of dissemination. Nonetheless, acting from an abundance of caution, by letter dated September 28, 1976, the Chamber requested confirmation from the FEC that this free distribution of *How They Voted* would not violate 2 U.S.C. § 441b, the general prohibition upon political activity by corporations and labor organizations.

On October 12, 1976, N. Bradley Litchfield, Assistant General Counsel of the FEC, responded that the distribution of *How They Voted* to individuals who are not members of the Chamber "would be prohibited by 2 U.S.C. § 441b, unless financed from voluntary contributions to a separate segregated fund, which may be used by a corporation for political purposes." FEC Opinion Letter O/R #790, reprinted in full at Appendix 1a. Mr. Litchfield further stated that "interpreted voting records of a Federal officeholder, reasonably read to support or oppose the voter, were in connection with a Federal election and thus precluded by 2 U.S.C. § 441b," and that:

[A] corporation like the Chamber may make partisan communications (other than solicitations) to the general public so long as the communications are not financed from general corporate funds . . . Furthermore, if the communication is limited to members of the Chamber, the communication may be both partisan and financed from the Chamber's treasury.

As a result of Mr. Litchfield's determination, the Chamber contacted each of the more than 1,000 non-members who had requested copies of *How They Voted* and informed them that due to FEC requirements, the Chamber was unable to provide them with free copies of the publication.

Upon receipt of the Litchfield letter, the Chamber was confronted with the following situation: publications which (1) contained publicly available information, (2) were published regularly, without mention of any Federal election or the candidacy of any particular Member

of Congress, (3) were prepared independently and were uncoordinated with any candidate, and (4) had previously received wide circulation by the Chamber and others, including the news media, could no longer be distributed at the Chamber's expense to anyone other than the Chamber's members. Consequently, commencing in October 1976, no free copies of *How They Voted* or *They Grade the Congress* were distributed to anyone who was not a Chamber member, thereby foreclosing distribution at no charge even to those incumbent Members of Congress who were the subjects of the rating.

In response to an obvious desire of at least some segment of the general public to have access to its voting records, yet fearing the civil and criminal penalties attendant upon violation of the Act, the Chamber, in the fall of 1976, began to study alternative means by which this public information might be legally distributed to any requestor.⁵ In December 1977, some fourteen months after the Litchfield letter, the Chamber established a separate segregated fund (the National Chamber Alliance for Politics, or "NCAP") as a vehicle for distributing both ratings of Members of Congress—which the Chamber obviously still believes had been incorrectly categorized by the FEC as partisan political communications—and as a vehicle for engaging in activities with the general public

⁵ After the Litchfield letter, distribution to non-members by the Chamber at no charge would presumably have been viewed at least by the FEC as a "knowing and willful" violation of the Act, potentially triggering the more severe civil penalties found in 2 U.S.C. §§ 437g(a)(6) and (7), as well as the criminal penalties contained in 2 U.S.C. § 441j. While the FEC's regulations were subsequently amended to permit corporations "to distribute to the general public the voting records of Members of Congress as long as the preparation and distribution is not for the purpose of influencing a Federal election," 11 C.F.R. § 114.4(b)(4), it is still unclear to the Chamber whether a distribution of *How They Voted* or *They Grade The Congress* to the general public would be permitted by the FEC, particularly during an election year.

which expressly advocate the election or defeat of candidates for federal office.

It was not until eighteen months after Mr. Litchfield's letter that the FEC retrenched ever so slightly from its apparent position that the Chamber could not distribute such ratings even to Members of Congress. In Advisory Opinion 1978-18, issued in response to a request from Congressman Dickinson, then ranking minority member of the House Administration Committee (which has jurisdiction over the FEC), the FEC held that the Chamber could make such a limited distribution. In so doing, the Commission dramatically revealed the fundamental vice underlying its analysis of the applicable provisions of the Federal Election Campaign Act. For, the FEC permitted this distribution specifically because:

that distribution would be made to all members of Congress whose voting records are presented . . . without regard to the status of the recipient as a candidate . . . Moreover, there is *no evident purpose to influence federal elections via the proposed distribution.*

FEC Advisory Opinion 1978-18, Federal Election Campaign Financing Guide (CCH) ¶ 5305 at 10,267 (emphasis added).

II. THE CHAMBER'S ATTEMPT TO COMPLY WITH FEC RESTRICTIONS HAS FORCED IT TO SET PRIORITIES AND LIMIT COMMUNICATION EFFORTS

As a result of the Litchfield letter, the Chamber must use the resources of NCAP, its separate segregated fund, to subsidize the distribution of its voting records. Through NCAP, the Chamber must overcome numerous constraints, some of which are insurmountable, before it can distribute its voting records to the general public.

For example, the Chamber is severely limited in the ways in which it can solicit contributions to NCAP. Specifically, 2 U.S.C. § 441(b)(4)(D) provides that or-

ganizations like the Chamber must obtain written permission from each corporate member before any solicitation may be made to the shareholders or to the executive or administrative personnel of that member corporation. Further, this prior permission may be granted by a corporation to only one such association per calendar year; and, finally, there is an absolute prohibition upon any solicitation of non-members regardless of the affinity of interest these persons may have with the Chamber.⁶

Thus, for example, for calendar year 1986, only 29 corporate members have given prior permission although the Chamber has more than 180,000 incorporated members. Similarly, neither the Chamber nor NCAP may solicit contributions from other separate segregated funds, 2 U.S.C. § 441(b)(4)(A), although it is legal for NCAP to accept unsolicited "transfers" from other separate segregated funds.⁷ Clearly, the solicitation provisions severely limit the amount of funds NCAP can raise.

Second, the legal position adopted by the FEC has forced the Chamber to divert scarce NCAP resources away from partisan political activity to the extent that the Chamber desires to widely disseminate these voting records. As a result, there is a second generation impact upon the Chamber's ability to engage in political speech unconnected with the distribution of the ratings at issue here. As recognized by this Court in *Buckley*, "restrictions on

⁶ These provisions were challenged as violations of the First and Fifth Amendments in *Bread Political Action Comm. v. FEC*, 635 F.2d 621 (7th Cir. 1980), *rev'd and remanded on procedural grounds*, 455 U.S. 577 (1982), *remanded to district court*, 678 F.2d 46 (7th Cir. 1982), *complaint withdrawn*, No. 77-C-947 (N.D. Ill. Feb. 1, 1983).

⁷ This anomalous situation was also attacked as a violation of the First and Fifth Amendments. *Martin Tractor Co. v. FEC*, 460 F. Supp. 1017 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (D.C. Cir.), *cert. denied sub nom. National Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980).

the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19.

Third, the FEC's restrictions have limited the Chamber in its own membership solicitation activities, since it is unable to show prospective members copies of *How They Voted* as an example of the Chamber's effectiveness as a lobbying organization. In essence, the Chamber is prohibited from using *How They Voted* as a promotional vehicle, a use which is completely unconnected with political activity.

The FEC argues in its brief that the statutory provision for the creation of a voluntary separate segregated fund for political purposes represents a "permissible constitutional balance," and that such segregated funds are "nothing more than the 'political arms of the parent organizations.'" Brief for Appellant at 23, *quoting Bread Political Action Committee*, 635 F.2d at 624 n.3. The FEC would have this Court believe that the parties here can "adequately publicize [their] political views through a separate segregated fund . . . [and that] section 441b has neither the purpose nor the effect of limiting the free flow of political information and opinion from corporations and unions to the public." Brief for Appellant at 24. Indeed, the FEC asserts that "there is no evidence that any corporation or union has been unable to adequately publicize its political views through a separate segregated fund." *Id.*

To support its argument that section 441b does not unduly restrict the amount or manner of political speech, the FEC characterizes the establishment and operation of such funds as an "inconvenience" (*id.* at 25) which "some corporations might not find . . . palatable." *Id.* at 27, n.14. According to the FEC, "so long as it is financed

out of a separate segregated fund, a corporation or union can utilize any method of communication it desires." *Id.* at 25, n.13. This facile characterization of the impact of separate segregated funds on constitutionally protected speech is symptomatic of what has been called the FEC's "disturbing legacy," illustrating its "insensitivity to First Amendment values" and "abysmal" failure to "exercis[e] its power in a manner harmonious with a system of free expression." *FEC v. Central Long Island Tax Reform Immediately Committee* ("CLITRIM"), 616 F.2d 45, 53, 55 (2d Cir. 1980) (Kaufman, Oakes, JJ., concurring).

A separate segregated fund does not provide an adequate or equivalent substitute for engaging in political speech. And it is more than an "unpalatable inconvenience." Rather, a separate segregated fund imposes severe limitations on the amount and manner of political speech. As demonstrated above, the Chamber has had to forego broad distribution of its voting records to the general public because of the limitations placed upon NCAP's fundraising abilities. These restrictions have forced it to set priorities among its communications efforts with the general public, subsidizing some activities at the expense of others because of the limited amount of funds available. As noted above, they have even affected the Chamber's ability to attract new members by effectively precluding its sales force from demonstrating the Chamber's strength as a lobbying organization through *How They Voted*.

The Chamber urges this Court to adopt the First Circuit's reasoning that "the availability of alternative methods of funding speech [does not justify] eliminating the simplest method." 769 F.2d at 22. This is particularly important where, as here, the only available alternative is to create a separate segregated fund which is statutorily prohibited from raising adequate funds to subsidize the very speech at issue, namely, the distribution of voting records to the general public.

III. FEC RESTRICTIONS ON THE DISTRIBUTION OF VOTING RECORDS TO THE GENERAL PUBLIC IMPOSE AN UNREASONABLE BURDEN ON CONSTITUTIONALLY PROTECTED SPEECH AND ARE NOT JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

Voting records are commonly used to inform the public about the conduct of their government officials. Designed to specify the particular position taken by an official on various pieces of legislation of interest to the publishing organization and its members, they have been long recognized as vehicles for organizations to "discuss publicly and truthfully all matters of public concern . . . [and] embrace all issues about which information is needed." *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940); *see also, Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("speech covering public affairs is more than self-expression; it is the essence of self-government").

This Court has recognized that such publications deserve as much protection as possible, in light of the history of the First Amendment:

[I]t is abundantly clear that . . . publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. . . . [I]t can hardly be doubted that th[is] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971); *see also, First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Roth v. United States*, 354 U.S. 476 (1957). Accordingly, there is no question that voting records constitute "speech" within the meaning of the First Amendment. As stated by this Court in *Buckley*, 424 U.S. at 14:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assume [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' [T]here is practically universal agreement that a major purpose of th[e] Amendment was to protect free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' (citations omitted.).

The Second Circuit has agreed, albeit on narrower grounds than argued here, that the FEC may not restrict distribution of voting records like the Chamber's. In *CLITRIM*, 616 F.2d 45, the court held that political expression, including discussion of candidates, is entitled to broad constitutional protection.⁸ The Second Circuit specifically stated that:

Public discussion of public issues which are also campaign issues readily and often unavoidably draws in

⁸ *CLITRIM* was an issue-oriented organization, like the Chamber and MCFL, which advocated lower taxes and less government spending. It was not affiliated with any political party, committee or candidate. The FEC alleged that *CLITRIM* had circulated a voting record which expressly advocated the election or defeat of a clearly identified candidate in violation of the filing and disclaimer requirements of 2 U.S.C. §§ 434(e) and 441(d). The voting record at issue set forth *CLITRIM*'s position on certain tax matters, the voting record of a particular Member of Congress on legislation involving these matters (characterized as "For Lower Taxes and Less Government" or "For Higher Taxes and More Government"), a photograph of the Congressman, and commentary reflecting *CLITRIM*'s view on the merits of the bills identified. Like the Chamber, *CLITRIM*'s voting record did not refer to any federal election, nor did it mention the particular Congressman's political affiliation, his candidacy or any electoral opponents.

candidates and their positions, their voting records and other official conduct. *Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.*

CLITRIM, 616 F.2d at 53, quoting *Buckley*, 424 U.S. at 42 n.50 (emphasis added). Indeed, the concurring opinion in *CLITRIM* emphatically decries the constraints the FEC has placed on organizations such as the Chamber and MCFL. Citing the FEC's action as both "perverse" and "disturbing," the concurring judges found that:

[C]itizens of this nation should not be required to account to [a] court for engaging in political debate . . . [F]reedom to criticize public officials and oppose or support their continuation in office constitutes the 'central meaning' of the First Amendment . . . Thus, courts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public.

Id. at 54 (emphasis added).

This Court has consistently held that the burden is on the government to show that the suppression of constitutionally protected speech is essential to a compelling government interest. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 362 (1976); *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 111 (1982); *Brown v. Hartlage*, 456 U.S. 45, 54 (1982); *Cohen v. California*, 403 U.S. 15, 26 (1971). And the government's showing is subject to the strictest form of scrutiny by the courts. *See, FEC v. National Conservative Political Action Committee*, 84 L. Ed. 2d 445, 472 (1985) ("NCPAC"), citing *Buckley*, 424 U.S. at 29 ("when the First Amendment is involved, our standard of review is 'rigorous'"); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) ("regulation of First Amendment rights is always subject to exacting judicial scrutiny"); *NAACP v. Ala-*

bama, 357 U.S. 449, 460-461 (1958) ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

Just last term, this Court reiterated *Buckley's* view that the prevention of corruption or the appearance of corruption is the "only legitimate and compelling" government interest that can support a restriction on campaign finances. *NCPAC*, 84 L.Ed. 2d at 469. *Accord*, *Citizens Against Rent Control*, 454 U.S. at 291. In striking down the FECA's limitations on independent expenditures by political committees, this Court reaffirmed *Buckley's* holding that there is a "fundamental constitutional difference" between direct contributions to candidates and independent expenditures. "[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 84 L. Ed. 2d at 470.

Thus, the Court held that the FEC's efforts in *NCPAC* "to link either corruption or the appearance of corruption to independent expenditures . . . simply does not pass [the Court's rigorous] standard of review." *Id.* at 472. Similarly, the FEC's efforts in this case to characterize voting records, particularly those compiled independent of any candidate, as a vehicle for political corruption also fail to establish either a legitimate or compelling government interest.

CONCLUSION

For these reasons, the Chamber of Commerce of the United States respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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April 4, 1986

APPENDIX

1a

APPENDIX

[EMBLEM]

FEDERAL ELECTION COMMISSION
1325 K Street N.W.
Washington, D.C. 20463

12 Oct. 1976

O/R # 790

Mr. Stanley T. Kaleczyc, Jr.
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20002

Dear Mr. Kaleczyc:

This is in response to your letter of September 28, 1976, requesting clarification of permissible nonpartisan activity under the Federal Election Campaign Act of 1971, as amended ("the Act"), which the Chamber of Commerce of the United States ("the Chamber") may engage in with respect to persons other than its membership.

I understand the Chamber, an incorporated federation of trade associations, prepared a rating of the Members of the 94th Congress, First Session, entitled "How They Voted." The rating, based on selected votes of U.S. Senators and Representatives, was originally published in the newsletter of the Chamber's legislative department, and subsequently reprinted in the May 31 edition of "Washington Report," the Chamber's general newsletter. You state "Reader's Digest" magazine sought and obtained approval from the Chamber's news department to publish a brief article indicating the existence and availability of the rating; the article appeared in the September issue of "Reader's Digest." As a consequence, the Chamber has received approximately 1,000 requests from

individuals for its rating, and asks whether its proposed distribution, to persons who are nonmembers of the Chamber, would be prohibited by the Act.

For the reasons discussed below, distribution by the Chamber of "How They Voted" to nonmembers would be prohibited by 2 U.S.C. § 441b, unless financed from voluntary contributions to a separate segregated fund, which may be used by a corporation for "political purposes," § 441b(b)(2)(C).

I note that the rating in question, while not specifically mentioning Federal candidates, offers an analysis of Federal officeholders—many of whom are Federal candidates—based upon votes taken on selected issues. The votes are not merely recorded, however, but are interpreted as "right" or "wrong" (with "right" votes in color for easy distinction), depending on agreement or lack of agreement with the Chamber's position on the issue. The rating's introduction reminds the reader that the selected votes affect the reader personally, refers to a discernable "voting pattern," offers a test enabling the reader to determine how "right" or "wrong" his Congressman has been on the issues, and concludes with the question, "How well are your representatives in Congress representing you?"

The Chamber's rating appears in clear contrast to a rating that does no more than state the vote taken, for throughout the rating it is not the vote, but the voter (Member of the House or Senate), who is prominently before the reader. As one example, the rating is entitled "How They Voted," not "What They Voted On." It could reasonably be read as support or endorsement of those voting in accord with the Chamber, and thus would contain a partisan message. See in this regard informational responses to Opinion Requests # 682 and # 544 (copies enclosed), in which interpreted voting records of a Federal Officeholder, reasonably read to support or oppose the voter, were "in connection with" a Federal election and

thus precluded by 2 U.S.C. § 441b from being financed from general corporate funds.

It is clear that both Congress and the Supreme Court agree a corporation may not make a direct or indirect contribution or expenditure in connection with a Federal election, and such a "connection" would be present in a partisan communication supporting a Federal officeholder who is also a Federal candidate:

At the present time there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a *strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates* (Emphasis added.)

Pipefitters v. United States, 92 S.Ct. 2247, 2272 (1972) (quoting Rep. Hansen's summary of § 610 amendment, 117 Cong. Rec. 43381)

Under the Act and the Commission's regulations, a corporation, including a corporation like the Chamber, may make partisan communications (other than solicitations) to the general public, so long as the communications are not financed from general corporate funds. 2 U.S.C. § 441b(b)(2)(C) and § 114.5(i) of the regulations. Furthermore, if the communication is limited to members of the Chamber, the communication may be both partisan and financed from the Chamber's corporate treasury. 2 U.S.C. § 441b(b)(2)(A) and § 114.7 and § 114.8(h) of the regulations.

As noted above, § 114.5(i) would allow the distribution of the Chamber's rating to nonmembers if financed by a separate political fund established by the Chamber under the requirements of § 441b. It would also be possible for a person who may make partisan communications to the general public (such as individuals, political com-

mittees, or separate segregated funds of corporations) to purchase the ratings for an amount covering all costs incurred by the Chamber in producing them, and then distribute the ratings to interested parties.

This response is informational only and not an advisory opinion since the Chamber does not have standing to receive an advisory opinion. 2 U.S.C. § 437f. Moreover, this response is based in part on proposed regulations of the Commission which should be regarded as interpretative rules indicating the Commission's view as to the meaning of the pertinent statutory language. The proposed regulations were transmitted to the Congress on August 3, 1976. See 2 U.S.C. § 438(c).

I hope this response is helpful for purposes of your inquiry.

Sincerely yours,

/s/ N. Bradley Litchfield
N. BRADLEY LITCHFIELD
Assistant General Counsel

Enclosures

MOTION FILED
APR 4 1986

(10)

No. 85-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
Appellant,
v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States Court
of Appeals for the First Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF AMICUS CURIAE OF JOSEPH M. SCHEIDLER
AND THE PRO-LIFE ACTION LEAGUE, INC.
IN SUPPORT OF APPELLEE**

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April 4, 1986

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IN THE
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OCTOBER TERM, 1985

 No. 85-701

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States Court
of Appeals for the First Circuit

**MOTION FOR LEAVE TO FILE BRIEF
BY JOSEPH M. SCHEIDLER AND PRO-LIFE
ACTION LEAGUE, INC., AS AMICI CURIAE
IN SUPPORT OF APPELLEE**

In this case, the Court of Appeals for the First Circuit determined that non-profit, ideological corporations should not be required to endure the burden and expense of forming a separate, segregated fund ("PAC") in order to engage in independent expenditures on issues pertinent to an election for federal office. The arguments which *amici* intend to bring before this honorable Court

are intended to give added support for this holding by demonstrating how the FEC's application of Sec. 441b in a case similar to the one at bar is acting as a virtual prohibition on political speech by a non-profit, ideological corporation.

Although the *amici* are closely allied in many ways to the position of the appellee Massachusetts Citizens for Life, they do not believe that either party will adequately address the critical issue of whether Section 441b of the Federal Election Campaign Act can be constitutionally applied against a corporation, like the League, that, for financial and organizational reasons, has elected not to organize itself to include a large staff or formal membership rolls. This issue is important because, under the FEC's enforcement of the Section 441b, nonprofit, ideological corporations like the League are prohibited from making independent expenditures to communicate to anyone other than their staff, directors and members on issues relevant to a campaign for federal office. If a corporation of this type desires to communicate beyond this limited sphere, the FEC's enforcement policies effectively require it to form a separate segregated fund (PAC), and to limit solicitation for such a fund to the same limited category—staff, directors and members—to which the corporation is entitled to directly communicate.

In the case before this Court, the Appellee, in the interest of avoiding further litigation, bowed to the FEC's policy and created a membership class as well as a separate segregated fund. Amicus Pro-Life Action League, however, would be forced to change its entire corporate structure, which is now highly centralized, to accommodate the creation of formal membership rolls to which it would be free to communicate and solicit for its PAC. Thus, the Pro-Life Action League cannot utilize the "PAC" option to exercise its First Amendment rights during the course of a federal election campaign without

sacrificing the form of corporate structure—highly centralized with very low overhead—which has been deliberately chosen as the form best suited to carry out its unique corporate mission. These arguments, *amici* respectfully submit, are important to proper understanding of the delicate balance that was articulated by the Court of Appeals between First Amendment rights and the legitimate governmental interest in regulation of campaign finances.

Respectfully submitted,

EDWARD R. GRANT *
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* Counsel of Record

April 4, 1986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-701

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States Court
of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF JOSEPH M. SCHEIDLER
AND THE PRO-LIFE ACTION LEAGUE, INC.
IN SUPPORT OF APPELLEE

INTEREST OF THE AMICI

Joseph M. Scheidler is Executive Director of the Pro-Life Action League, Inc (the League), a non-profit, non-membership, public interest organization dedicated to preserving the sanctity of human life, including that of the unborn. During 1984, the League spent \$500.00 to protest the position on abortion taken by the Democratic candidates for President and Vice-President. On January 31, 1985, the Federal Election Commission (FEC) found reason to believe that the League and Mr. Scheidler had

violated Section 441b of the Federal Election Campaign Act, 2 U.S.C. Sec. 441b (1982). This finding is presently being litigated before the FEC. *In re Pro-Life Action League, Inc.*, MUR 1826.

The initiation of litigation against Joseph M. Scheidler and the League for the expenditure of \$500.00 to protest a candidate's well-known stand on an issue of major public importance illustrates the breadth with which the FEC is applying Section 441b against non-profit, ideological organizations and the length to which it will go to enforce that interpretation. This application of Section 441b against such non-membership, non-profit, ideological organizations strangles the First Amendment liberties of these organizations and may well force them to adopt a radical alteration in their corporate structure, or preclude them from participating altogether in the area of political activity. The interests of the *amici* will be served by affirmance of the ruling of the First Circuit Court of Appeals, upholding the rights of non-profit, educational corporations to exercise their First Amendment rights in the context of elections for federal office.

SUMMARY OF ARGUMENT

The FEC portrays its case against Massachusetts Citizens For Life (MCFL) as one in which reasonable people could differ on the possibility for corruption of elections. The FEC suggests that the Court of Appeals' striking of the statute is an improper "second-guessing" of the FEC's mandate. The facts of this case, however, belie this caricature. This Court's decisions over the past decade compel the conclusion that independent expenditures by a non-profit, ideological organization to disseminate truthful information about the voting records of federal candidates are pure speech, protected by the First Amendment, which cannot be regulated in the manner advanced by Section 441b.

Restricting non-profit ideological corporations from communicating on issues relevant to a federal election to anyone other than the formal members of the corporation is an unwarranted intrusion upon the First Amendment rights of the corporation, and of those who are interested in receiving the corporation's message. No substantial governmental interest in averting corruption or its appearance is served by restricting speech to such an absurdly small audience. Citizens who contribute to a non-profit, ideological corporation are in no danger of having their funds diverted to political causes with which they are not in agreement. In addition, the governmental interests which may apply in the case of direct contributions to candidates and political committees are simply not present in the case of independent expenditures such as those at issue in this case, and those typically made by other non-profit, ideological corporations.

Even if there were a governmental interest sufficient to justify some measure of regulation of such independent expenditures, Sec. 441b and FEC regulations are not narrowly tailored to serve those interests. The FECA, on its face and as applied, sweeps in all forms of corporations, including those which have consciously chosen not to organize themselves with formal membership rolls. The burdens of establishing a membership with which the corporation may legitimately communicate are substantial and serve no legitimate governmental interest, since the membership rolls are likely to be duplicative of the lists of supporters and constituents which are currently maintained by the ideological corporation for its educational purposes.

The availability of a separate, segregated fund (PAC) as a vehicle for independent expenditures does not cure the defects of Sec. 441b as applied to non-profit, ideological corporations. The PAC requirement serves no substantial governmental interest, since, in the case of the ideological corporation, the PAC is simply a duplication

of the existing corporate structure. The burdens that forming a PAC places upon a corporation are substantial. Most importantly, in the case of the corporation without formal membership rolls, there is no realistic opportunity to "speak through" a PAC, since solicitation for the PAC is limited to those who meet technical membership requirements. Thus, the combination of Sec. 441b's prohibition on political communications beyond the membership class, and the limitation of PAC solicitation to the membership class, acts as an absolute bar on independent expenditures by corporations such as the *amicus*, Pro-Life Action League. In addition, these regulations violate the constitutional restrictions on compelled disclosure of unpopular political association.

The application of section 441b to such non-profit, ideological organizations disregards the fundamentally different nature of such organizations from that of traditional, commercial corporations and unions and the corresponding lack of corruption of candidates and danger of deception of citizens. It is therefore unconstitutionally overbroad. It represents regulation for the sake of regulation.

ARGUMENT

I. INTRODUCTION

Joseph M. Scheidler, Executive Director of the Pro-Life Action League, Inc. (League), is a graduate of Notre Dame University (B.A. Journalism) and Marquette University (M.A. Communications). He has worked for a number of newspapers and magazines, including the *South Bend Tribune* and *Our Sunday Visitor*. He has taught journalism at Notre Dame and theology at Mundelein College. He was formerly executive director of the Illinois Right to Life Committee and of Friends for Life.

In 1980, Joseph Scheidler formed the Pro-Life Action League, Inc. (League) for "the promotion of the social good and welfare of the people of the community . . .

[and] assistance in promoting the rights of the unborn and defenseless human beings . . ." The League is a non-profit, public interest corporation. The League has three full-time paid staff people, consisting of Joseph Scheidler, his wife, Ann Scheidler, and an executive secretary, Barbara Menes. These three also make up the Board of Directors. There are no members or stockholders within the definitions set forth in the Federal Election Campaign Act (FECA), 2 U.S.C. Sec. 441b (1982). The League does not require any set amount of dues to be a "member"; a simple request to be on the League's mailing list suffices. The League's corporate structure was organized in such a form as to maximize the centralization of control of policy-making authority in the executive director and to minimize overhead and administrative costs.

The League was "designed expressly to participate in political debate", and, as a result, is "quite different from the traditional corporations organized for economic gain." *Federal Election Commission v. National Conservative Political Action Com.*, 105 S.Ct. 1459, 1470 (1985) ("NCPAC"). The purpose of forming the League was similar to that stated by this Court, in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost . . . Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

Id. at 294, 295 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). "[G]roup association is protected because it enhances effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (cit. omit.)

The main activity of the League is to demonstrate, speak, picket, and educate on behalf of the unborn and

against abortion. Mr. Scheidler regularly engages in public speaking, having taken 159 trips to various parts of the country in 1985 and 25 trips so far in 1986. The League works with other activist groups around the country and maintains a telephone hotline, which describes the recent and upcoming activities in which the League is engaged. The League has a yearly budget of approximately \$120,000. All fundraising is now undertaken by the three staff members. The League does not contribute to or endorse any political candidate to any election, and has never done so.

Mr. Scheidler initiated a protest against Mrs. Ferraro in response to what he considered to be her inaccurate and erroneous statements on the history and status of Catholic teaching on abortion and the sanctity of human life. In July, 1984, in order to encourage protest of the pro-abortion position of the Democratic candidates for President and Vice-President, Mr. Scheidler sent a letter to approximately 300 persons or groups who were well-known to, and allied with, the League. These recipients were neither members of the "general public", nor members of the League within the definition of Section 441b. 2 U.S.C. Sec. 441b(b)(2)(A) (1982). The cost of preparing and sending this letter, including postage, was \$108.20. The League also spent approximately \$200.00 on fliers, long distance telephone calls, and for signs to protest Ferraro's position on abortion. Finally, the League spent \$238.00 for travel to participate in a picket of Mrs. Ferraro in New York.

In October 1984, attorneys for the National Abortion Rights Action League (NARAL) filed a complaint with the FEC against the League and Mr. Scheidler. On January 31, 1985, the FEC found reason to believe that the League and Mr. Scheidler had violated Section 441b.

The application of Section 441b to independent expenditures by the League, MCFL, and similar ideological

corporations serves none of the original purposes of the Act and suppresses free speech in violation of the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (*Berkeley*), *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982) ("NRWC"), *Federal Election Commission v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1468 (1985) ("NCPAC"). In *NCPAC*, this Court left open the question "whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *Id.* at 1468. That question, as applied to independent, uncoordinated expenditures by a non-profit, ideological corporation, is now presented to this Court. The confluence of the principles enunciated in these cases necessitates a negative answer to that question and the affirmance of the decision of the Court of Appeals below.

II. SECTION 441b CANNOT CONSTITUTIONALLY BE APPLIED TO INDEPENDENT EXPENDITURES BY AN IDEOLOGICAL CORPORATION TO COMMUNICATE ITS POSITION ON ISSUES THAT ARE CONTESTED IN A FEDERAL ELECTION.

A. The FEC Must Demonstrate That The Application Of Section 441b To Independent, Uncoordinated Expenditures Of Ideological Corporations Serves A "Sufficiently Strong Governmental Interest" And Is "Narrowly Tailored To Prevent The Evil That May Legitimately Be Regulated."

Independent, uncoordinated expenditures "produce speech at the core of the First Amendment." *Federal Election Commission v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1467 (1985) (*NCPAC*). The expenditure of money by commercial corporations to publicize views on a state constitutional amendment was held to be speech "at the heart of the First Amendment's protection" in *First National Bank of Boston v. Bellotti*,

435 U.S. 765, 776 (1978). Only a "sufficiently strong governmental interest" can justify regulation of such expenditures, and that regulation must be "narrowly tailored to the evil that may legitimately be regulated." *NCPAC*, 105 S.Ct. at 1468-69. "[P]reventing corruption or the appearance or corruption" are the only governmental interests that may justify regulations on such expenditures. *Id.* at 1469. Thus, in order to be constitutionally applicable to independent expenditures, by non-profit, ideological corporations, Section 441b must be "narrowly tailored" to prevent corruption or the appearance of corruption flowing from expenditures by such organizations.

B. Section 441b Cannot Be Constitutionally Applied To Communications By A Non-Profit, Ideological Corporation On Issues Relevant To A Campaign For Federal Office, Especially When Those Communications Are Made To Non-Members Who Support The Corporation's Educational Goals.

1. *There is no substantial governmental interest in limiting independent, educational, and political communications of non-profit, educational corporations to the membership of those corporations.*

Section 441b prohibits "any national bank, or any corporation organized by authority of any law of Congress" from making "a contribution or expenditure in connection with any election to any political office." In order for corporations and unions to make such expenditures, Section 441b requires them to establish a "separate segregated fund," commonly called a political action committee (PAC). 2 U.S.C. Sec. 441b(b)(2)(C), Sec. 431(4)(b). In turn, the FECA prohibits the PAC from soliciting contributions "from persons other than its stockholders and their families and its executive and administrative personnel and their families." *NWRC*, 459 U.S. at 202, 2 U.S.C. Sec. 441b(b)(4)(A). The PAC, however, is allowed to solicit funds "from members of the

sponsoring corporation." *Id.*, 2 U.S.C. Sec. 441b(b)(4)(C). "The effect of this proviso is to limit solicitation by non-profit corporations to those persons attached in some way to it by its corporate structure." *NWRC*, 459 U.S. at 202.

The FECA and its predecessors, the Tillman Act of 1907, ch. 420, 34 Stat. 864, the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, and the Labor Management Relations Act of 1947, 61 Stat. 136, were created with traditional, profit-making, commercial corporations and unions as their object. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208-10 (1982), *United States v. United Auto Workers*, 352 U.S. 567, 570-585 (1957) ("UAW"), *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 112-121 (1948) ("CIO"). They had two fundamental purposes. First, they were enacted to ensure that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *NWRC*, 459 U.S. at 207, *UAW*, 352 U.S. at 575. Second, these statutes were intended to protect shareholders and union members who have paid money into a commercial corporation "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NWRC*, 459 U.S. at 208, *CIO*, 335 U.S. at 115. These statutes were not enacted with independent expenditures by non-profit, ideological corporations in mind. See Brief of Amicus Curiae National Rifle Association In Support of Appellee.

In view of the original purposes of the FECA and its predecessors, there are no substantial, governmental interests in prohibiting (except for communications to the staff, directors and membership) independent expenditures by corporations such as the League and MCFL con-

cerning candidates and issues in federal elections. This Court has noted that the "hallmark of corruption"—dollars for political favors—is not present in the case of independent expenditures in support of candidates, even where those expenditures are made by wealthy PACs in support of specific candidates. *NCPAC*, 105 S.Ct. at 1469. Consequently, corruption or its appearance are much *less* present in the case of MCFL and the League, which have not endorsed candidates but only seek to inform citizens about a particular issue and where candidates stand on that issue.

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

NCPAC, 105 S.Ct. at 1469. Ideological organizations cannot discuss issues during the course of elections in an informative way without also discussing how those issues relate to candidates. The newsletter published by MCFL was informative and merely reported the voting record of candidates as they relate to the ideas for which MCFL exists.

[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. Since there is no *quid pro quo*, there can be no substantial governmental interest in limiting this form of communication.

Due to the clear distinction which this Court has drawn between independent expenditures and direct contributions, this case must be distinguished from that which was presented to this Court in *National Right to*

Work Committee. Indeed, this Court's decisions from *Buckley* to *NCPAC* emphasize that this distinction is dispositive on the question of whether there is a substantial state interest in support of regulation. This case is further distanced from *NRWC* by the fact that MCFL, and even more so the League, are akin to "lone pamphleteers or street corner orators in the Tom Paine mold." *NCPAC*, 105 S. Ct. at 1467. Indeed, groups such as MCFL and the League advance viewpoints that some consider to be positively seditious—all the more reason to scrupulously examine the purported interest in the regulation of such speech.

In addition, ideological organizations which make independent expenditures to inform the public about candidates do not pose a reasonable threat of misusing funds for political purposes which have been provided to the corporation by persons opposed to those purposes. There are several reasons for this. The financial relationship of contributors to ideological organizations is usually limited to the cash or check that they unilaterally contribute in response to specific, public appeals. If they become disenchanted with the activities of the organization, they can easily stop all contributions and ties. Members of unions and corporations, in contrast, are often employees or stockholders who have a substantial, financial relationship with the corporation, including employment. That financial relationship cannot be easily severed whenever the member disagrees with how money is spent by the union or corporation, thus creating a substantial governmental interest in enforcing the separate, segregated fund requirement.

The functions of traditional unions and commercial corporations, and the purposes for which they might spend members' funds, are not as public, nor as clearly defined, as those of non-profit, ideological organizations. Like media corporations, ideological organizations "accomplish the same objective every day within the frame-

work of their usual protected communications." *Bel-lotti*, 435 U.S. at 781-82 n.17. Members of unions and corporations may not know whether the corporation funds the Sandinistas or invests in South Africa. Moreover, the choice to contribute to a particular candidate may reflect the personal preferences of the corporate or union hierarchy more than the interests of the members. The essential nature of ideological organizations and their difference from traditional profit-making corporations and unions demonstrate that no substantial governmental interest exists for prohibiting independent, uncoordinated expenditures by such groups.

2. *The restrictions of Section 441b are not narrowly tailored to prevent corruption or the appearance of corruption of federal elections.*

Even if the governmental interest in regulating corruption was found to justify some form of restriction on independent expenditures by a non-profit, ideological corporation, it is evident that Sec. 441b is not narrowly tailored to meet that interest. The present action against MCFL, and the pending action against the League, make this abundantly clear. In both cases, the FEC seeks to apply Sec. 441b's prohibition on corporate expenditures to communications which were directed in part to individuals and groups which, while not meeting the FECA's full criteria for membership, had clearly evidenced an allegiance and ideological affiliation with the goals of the corporation. Sec. 441b, therefore, is being used to limit political speech by a non-profit ideological corporation to an absurdly small category of persons: those with formal membership status in the corporation. Such a blanket restriction places a penalty upon efforts by the corporation to communicate with those who desire to hear the corporation's political message, but have not, for financial or other reasons, become formal "members" of the corporation. Sec. 441b creates a situation whereby political speech between a corporation and such an in-

terested party actually receives *less* protection than speech on non-political matters. Such a scheme of regulation cannot be characterized as "narrowly tailored" to any governmental interest.

The impact of Sec. 441b is even more profound in the case of a corporation, such as the League, which has purposefully chosen not to have formal membership rolls. For such a corporation, Sec. 441b acts as an absolute prohibition on political speech, and thus, has not been narrowly tailored to take into account the interests of this type of corporation. Indeed, application of Sec. 441b in such circumstances constitutes an impermissible prior restraint on the exercise of free speech. *Talley v. California*, 362 U.S. 60 (1960), *Thomas v. Collins*, 323 U.S. 516 (1945).

For a variety of reasons, ideological organizations such as the League and MCFL typically do not invest the funds and manpower that would be required into building and sustaining membership rolls. Rather, they operate on limited funds, with expanding and contracting donor bases that fluctuate with the times and the headlines. Ideological organizations are supported because contributors share the goals of the organization, believe in its vision, and wish to further its work. Such organizations do not provide tangible benefits to contributors. It is the ideological identity of the organization which draws funds, not the contributor's financial or vocational commitment to the corporation, as in the case of commercial corporations and unions. This carries dangers of instability for the ideological organizations, but also mitigates any danger of corruption.

Nevertheless, in its actions against MCFL and the League, the FEC is effectively forcing these groups to create formal membership rolls as a price for speaking on issues connected with an election to federal office. The

FEC is enforcing this choice in two distinct ways. First, the FEC is attempting to restrict the audience of political speech by the League and MCFL to persons who are duly qualified as members. Second, in the event that the League and MCFL wish to communicate *beyond* this limited sphere, the FEC is attempting to require that the funds for such speech be separately solicited from the membership class. For an organization such as the League, which has no membership class that would be eligible to receive solicitations, this requirement is tantamount to an absolute prohibition on corporate political speech. (See Section C of this Brief).

Furthermore, even where a corporation is able to comply with the FEC's mandate to form a membership class and restrict communications to that class, the effort of doing so burdens the exercise of First Amendment rights by diverting funds from the corporation's educational program to the costs of administration. In the case of the League, it was to avoid this very problem that the incorporators declined to provide for a membership class. By prohibiting the League from communicating on issues in a federal election to persons who support the League's goals, the FEC is also infringing the rights of League supporters who may be too poor to pay dues on a regular basis, but may depend upon communications from the League in guiding their own voting and other political activity. Hence, the application of Sec. 441b to groups such as the League and MCFL threatens not only the free speech rights of these corporations, but also may chill the discussion of issues throughout the body politic.¹

¹ Congress and the FEC have made it abundantly clear that the membership class requirements for PAC solicitation and corporate political communication may not be satisfied by creating perfunctory or donation-only criteria for corporate membership. An incorporated membership organization or corporation without capital stock may make certain partisan communications to "its members and executive or administrative personnel, and their families." 11

In limiting corporate political communications to those on formal membership rolls, and extending that limitation to all corporations, including ideological, non-profit corporations, Congress and the FEC have failed to recognize the differences between these corporations and the corporate bodies whose political activity was the real target of the FECA and its predecessors. This Court noted, in *NCPAC*, that ideological groups and associations, "designed expressly to participate in political debate, are quite different from the traditional corporations organized for economic gain." 105 S.Ct. at 1470. These differences substantially curtail the governmental interest in regulating the political speech of the ideological corporation. Because Congress and the FEC have failed to recognize these differences, and seek to apply Sec. 441b broadly to *all* corporations and *all* forms of activity that may be deemed remotely political, they have failed in their obligation to narrowly tailor this scheme of regulation to meet the government's interest in preventing corruption.

C.F.R. Sec. 114.3(a)(2) (1985). The term "member" is defined as "all persons who are currently satisfying the requirements for membership in a membership organization" or corporation without capital stock. 11 C.F.R. Sec. 114.1(e). A person is not encompassed within this definition if the only requirement for membership is a contribution to a separate, segregated fund. In Advisory Opinion 1977-67, the FEC stated that "a person can only be considered a member of an organization if he or she knowingly has taken some affirmative steps to become a member of the organization . . . the membership relationship must be evidenced by the existence of rights and obligations vis-a-vis the corporation." A "predetermined minimum amount for dues or contributions" were considered a prerequisite to claiming the membership exception. *Id.* Consequently, the FEC's admonition that groups like MCFL and the League may remedy their difficulties with the Commission by "simply" forming PACs and membership classes severely understates the burdens that such steps may place upon a corporation which heretofore has had no membership class.

C. The Unconstitutionality Of Section 441b's Prohibition On Independent Expenditures By Non-Profit, Ideological Corporations Is Not Mitigated By The Option To Create A Separate, Segregated Fund.

In response to the argument that Section 441b impermissibly restricts the First Amendment rights of corporations, the FEC has contended that corporations are free to create a separate, segregated fund (PAC) to participate in elections for federal office. This argument fails because, in the case of non-profit ideological corporations, the "PAC option" creates substantial burdens upon the exercise of free speech, with no corresponding governmental interest sufficient to justify such burdens. Specifically, the PAC requirement mandates that the corporation devote substantial resources to the creation of a separate unit which effectively duplicates the function of the corporation. As already established, the governmental interests in preventing corruption and protecting the rights of the "unwilling contributor" are irrelevant to a non-profit corporation whose ideological stance is its primary and sole identity. Furthermore, in the case of a corporation without formal membership, such as MCFL prior to 1980, or the League, the PAC requirement acts as a *de facto* prohibition on independent expenditures. Finally, rather than serve the governmental interest in disclosure of political financing, the PAC requirement, when applied to controversial organizations such as the League and MCFL, violates the constitutional prohibition on compelled disclosure of political affiliation.

1. The formation and administration of a PAC burdens the exercise of First Amendment rights.

The requirement that non-profit ideological corporations form a PAC unduly burdens First Amendment rights by allowing the exercise of such rights *only* if the corporation is willing (and able) to devote the time, money, and personnel necessary to administer a PAC and to comply with the detailed record-keeping and reporting require-

ments to which PACs are subject. The creation and administration of a PAC requires knowledge of and compliance with the Act's extensive record-keeping and reporting requirements. The Act requires a PAC's treasurer to keep a record of all contributions received and expenditures made by the PAC. 2 U.S.C. Sec. 432(c); 11 C.F.R. Sec. 102.9. The records must include, for example, the name and address of each person who makes a single contribution in excess of \$50, and each person whose aggregate contributions during the calendar year exceed \$200. *Id.* Sec. 432(c)(2), 432(c)(3), 11 C.F.R. Sec. 102.9(a). The records must also include the name and address of *every* person to whom *any* expenditure is made, as well as the date, amount and purpose of the expenditure. *Id.* Sec. 432(c)(5); 11 C.F.R. Sec. 102.9(b). In addition to expenditure records, the PAC's treasurer must retain a receipt or invoice from the payee or a cancelled check given to the payee for each single expenditure in excess of \$200. *Id.* Sec. 432(c)(5); 11 C.F.R. Sec. 102.9(b).

The reporting requirements to which PACs are subject are similarly intrusive. *See* 2 U.S.C. Sec. 434(b); 11 C.F.R. Part 104. All PACs are required to file with the FEC detailed financial reports for each quarter in which contributions or expenditures are received or made. *Id.* Sec. 434(a)(4)(A)(i). In addition, "pre-election reports" must be filed within 12 days of certain elections. *Id.* 434(a)(4)(A)(ii), and "post election reports" must be filed within thirty days after a general election. *Id.* Sec. 434(a)(4)(A)(iii). The Act contains detailed requirements concerning the contents of such reports. 2 U.S.C. Sec. 434(b); 11 C.F.R. Sec. 104.3.

Aside from disclosing the dollar amount of all receipts and disbursements in various categories, reports must also disclose the identities of certain persons or entities who have dealt with the PAC. 2 U.S.C. Sec. 434(b); 11 C.F.R. Sec. 104.3(b)(3), (b)(4). The reports must disclose, for instance, the identity of each person

whose individual or aggregate contributions to the PAC for the reporting period or calendar year exceed \$200, 2 U.S.C. Sec. 434(b)(3); 11 C.F.R. Sec. 104.3(b)(3); each person to whom the PAC makes single or aggregate expenditures in excess of \$200 during the reporting period or calendar year, together with the date, amount and a statement of why the expenditure was made, 2 U.S.C. Sec. 434(b)(5); 11 C.F.R. Sec. 104.3(b)(3); and each person to whom an independent expenditure in excess of \$200 is made by the PAC, together with a statement indicating whether the expenditure is in support of or opposition to a particular candidate. 11 C.F.R. Sec. 104.3(b)(3)(vii)(B). In the case of independent expenditures of \$1,000 or more made within 20 days of an election, a separate report of the expenditure must be filed within 24 hours after it is made. 11 C.F.R. Sec. 104.4(b) (1985).

In addition to the Act's record-keeping and reporting requirements, the fund-raising activities of a PAC and the organization which creates it are closely regulated. In the case of non-stock corporations and membership organizations, funds may be solicited only from the corporations' or organizations' "members." 2 U.S.C. Sec. 441b(b)(4)(C); 11 C.F.R. Sec. 114.7(a). Moreover, non-soliciting partisan communications in connection with an election must also be restricted to "members." See 11 C.F.R. Sec. 114.7(h); cf. 2 U.S.C. Sec. 441b(b)(2)(A).

Without detailing further the regulatory harnesses placed upon PACs (e.g., deadlines for depositing contributions; mandatory banking accounts, etc.), it should be obvious that both corporate and individual First Amendment rights are seriously infringed by the Act's requirement that group speech in corporate form be stifled unless an organization is willing to create, and has the extensive financial, administrative and manpower resources necessary to administer, a PAC.

2. The limitations on PAC solicitation make it impossible for a non-profit, non-membership corporation to effectively operate a PAC, and thus act as an absolute ban on political speech pertaining to federal elections, by such corporations.

In addition to the requirements on reporting and record-keeping, the FECA closely regulates the fund-raising activities of a PAC. Solicitations for the PAC, as well as non-soliciting partisan communications in connection with an election, are limited to members of the corporations. See 11 C.F.R. Sec. 114.7(a), (h). In the case of MCFL, the PAC requirement has caused the corporation not only to undertake the burden and expense of operating a PAC, but has also forced MCFL to convert its status to that of a membership corporation. There is nothing in the record to support the FEC's assumption that this process caused no burden for MCFL; indeed, assuming full compliance by MCFL with the FECA, it is difficult to imagine how this conversion process could have been anything other than burdensome.

In the case of corporations which are *not* willing or able to form membership rolls, however, the FECA's limitations on solicitation and communication do far more than create a burden on corporate speech: they threaten to silence that speech altogether. A corporation such as the League, which has deliberately chosen a non-membership structure to best advance the goals of the corporation, would be severely affected by reversal in this case.

After unsatisfactory experiences as the head of several organizations in promoting his own special brand of pro-life activism, Mr. Scheidler, along with his wife and his secretary, organized the Pro-Life Action League. Although the League has thousands of supporters, the articles of incorporation and by-laws severely restrict membership. A large, open membership, even if restricted to pro-life supporters, does not suit the League's corporate purpose. That purpose is to promote direct ac-

tivism: picketing, speaking, and, at times, acts of civil disobedience. No "membership" is necessary to carry out these purposes; those sufficiently motivated to participate along with Mr. Scheidler will do so regardless of their status in the corporation. Moreover, due to the controversial nature of Mr. Scheidler's activity, it is mutually beneficial to Mr. Scheidler and to his supporters to keep formal ties to a minimum. Mr. Scheidler does not aspire to represent a "membership", but only to represent a cause.

As such, the directors' choice to operate the League as a non-membership corporation is a conscious exercise of a First Amendment associational freedom. Section 441b abridges that freedom by effectively forcing the League to choose between relinquishing one of two fundamental rights under the First Amendment: its right to communicate on issues relevant to a campaign for federal office, and its right to exercise its associational freedom in the form of a non-membership corporation. The threat to associational freedom is real, because the definition of "member" is limited by the FEC to a class of persons with defined "rights and responsibilities vis-a-vis the corporation." FEC Advisory Opinion 1977-67; 11 C.F.R. Sec. 114.1(e). The League's choice to operate without such a defined class of persons thereby threatens the League's right to engage in political speech.

3. Requiring the formation of a PAC as a vehicle for corporate political speech violates the right against compelled disclosure of organizations that espouse unpopular causes and of the persons who support them.

As this Court has recognized, the FECA's reporting requirements place serious burdens on the exercise of constitutional rights: "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First

Amendment." *Buckley v. Valeo*, 424 U.S. at 64 (and cases cited). The FECA's compelled identification of certain individuals who contribute to or receive funds from a PAC, 2 U.S.C. Sec. 434(b), are precisely the sorts of disclosure requirements which cast a chill upon First Amendment speech and associational rights. The loss of anonymity resulting from such disclosure requirements may have a deterrent effect on those who would otherwise consider becoming linked to a cause (such as abortion) which is publicly viewed as unpopular and unorthodox. See, e.g., *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982) (holding that the disclosure and record-keeping requirements of the Act are unconstitutional as applied to the Communist Party). This chilling effect not only abrogates the First Amendment rights of privacy and association for those individuals whose identities would be reported, but also interferes with the associational rights of the reporting organization whose ability to attract supporters may be reduced.

In several decisions, this Court has delineated the First Amendment limitations to "compelled disclosure", where regulations coerce disclosure, to the state, of private information of associations. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), *Buckley v. Valeo*, 424 U.S. 1 (1976), *NAACP v. Alabama*, 357 U.S. 449 (1958). Statutes which compel disclosure "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64. There must be a "subordinating interest of the State that is compelling," *Brown*, 459 U.S. at 91-92, and a "substantial relation between the governmental interest and the information required to be disclosed." *Id.*, *Buckley*, 424 U.S. at 64. Contributions to non-profit, ideological organizations who, in turn, make no contributions, but only independent expenditures, constitute political association, not contributions to candidates. "The Constitution protects against the compelled disclosure of

political associations and beliefs. Such disclosures can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown*, 459 U.S. at 91.

There are only three legitimate governmental interests in disclosure: (1) providing the "electorate with information 'as to where political campaign money comes from and how it is spent by the candidate'", (2) deterring "actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) gathering the data necessary to detect violations of the contribution limits." *Brown*, 459 U.S. at 92, *Buckley*, 424 U.S. at 66-68. Plainly, all these governmental interests relate to contributions, not independent, uncoordinated expenditures. None exists in this case.

Providing the electorate with "information as to where political campaign money comes from and how it is spent by the candidate" is not relevant to independent expenditures. Second, deterrence of corruption from contributions is similarly not relevant to independent expenditures. In *Buckley*, this Court recognized this interest as substantial only in the context of "the most generous supporters" of candidates. *Id.* at 67. Deterrence of the corruption of candidates in the context of independent expenditures by ideological organizations is simply not a substantial interest. Finally, since the preceding governmental interests do not apply to independent expenditures by a non-profit, ideological organization, the "gathering of data necessary to detect violations of the contribution limitations" cannot be relevant.

The FEC counters by citing this Court's dicta in *Buckley* that "[t]he corruption potential of these [independent] expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." 424 U.S. at 81.

Subsequent to *Buckley*, this Court has made clear that independent expenditures, especially those by ideological corporations, have such a fundamentally different nature from candidate contributions that they are entitled to greater constitutional protection. *NCPAC*, 105 S.Ct. at 1469. Despite the dicta cited by the FEC, the Court in *Buckley* "found no tendency in [independent] expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." *Id.* Although the FEC broadly claims to be protecting an informed electorate, this Court has stated that the governmental interests which justify disclosure are not in an informed electorate *per se* but are more appropriately limited to information which shows "where political campaign money comes from and how it is spent by the candidate," deters corruption by exposing large contributions and expenditures, and detects violations of contribution limits. This limited information will not be obtained by compelled disclosure of the contributions to non-profit, ideological groups who make only independent expenditures, and thus disclosure of information about such independent expenditures does not relate to the three interests which justify compelled disclosure.

Since such governmental interests do not exist in the context of this case, it is not necessary for MCFL or the League to make a "requisite factual showing" of harassment. *Buckley*, 424 U.S. at 69 (citing *NAACP v. Alabama*, 357 U.S. at 462). The burden is on the Government to show that "substantial governmental interests" exist for the disclosure, before MCFL or the League need to make a requisite factual showing. *Brown*, 459 U.S. at 92, *Buckley*, 424 U.S. at 69. Since no substantial governmental interest exists in requiring compelled disclosure of contributions to non-profit, ideological organizations who make independent, uncoordinated expenditures, compelled disclosure cannot be required of such organizations, like MCFL and the League.

D. There Is No Substantial Governmental Interest Which Justifies Requiring Non-Profit, Ideological Organizations To Register As "Political Committees."

There is no substantial governmental interest in applying Section 441b to independent, uncoordinated expenditures by non-profit, ideological organizations under Section 441b. Nevertheless, it might be argued that, in the alternative, organizations such as MCFL and the League should be regulated, and required to register, as "political committees" under Section 431 of the FECA. This argument can only be made with disregard for the settled principle that there must be "substantial governmental interests" to regulate, in any fashion, campaign finances. Since no such interests exist to apply Section 441b to such organizations, none exists to require their registration as political committees. To do so would constitute regulation of political expression merely for the sake of regulation.

In *Buckley v. Valeo*, this Court narrowly defined "political committee" and "expenditure", as it relates to such committees, to exclude ideological corporations like MCFL and the League. The Court feared that "political committee" could be "interpreted to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. The Court approved this narrow construction by lower courts. *Id.*

To fulfill the purposes of the Act [the term] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress.

Id. Moreover, the Court stated:

[W]hen the maker of the expenditure is not within these categories—when it is an individual other than

a candidate or a group other than a "political committee"—the relation of the information sought to the purposes of the Act may be too remote. To ensure that the reach of [Sec.] 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of [Sec.] 608 (e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

Id. at 80. This narrow construction was adopted to avoid problems of unconstitutional vagueness. *Id.* at 77-78.

In this case, MCFL made independent expenditures to inform interested pro-life voters about the voting records of a number of candidates and to encourage voters to vote pro-life. These expenditures were not made to "expressly advocate the election or defeat of a clearly identified candidate"; nor was the spending "unambiguously related to the campaign of a particular federal candidate." If "political committee" and "expenditure" were construed more broadly than done in *Buckley*, it is hard to imagine any association of citizens who could join together to inform voters about their elected representatives without coming within the confines of the FECA. Such a construction would take the FECA far afield from its original, constitutional purpose of regulating the infusion of large accumulations of wealth by commercial corporations and labor unions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

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11
No. 85-701

Supreme Court, U.S.
FILED

APR 4 1986

JOSEPH F. SPANIOLO, JR.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1985

**FEDERAL ELECTION COMMISSION,
APPELLANT,**

v.

**MASSACHUSETTS CITIZENS FOR LIFE, INC.,
APPELLEE.**

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT.**

**BRIEF AMICI CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE CIVIL LIBERTIES
UNION OF MASSACHUSETTS.**

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April 4, 1986

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In the Supreme Court of the United States
October Term, 1985

No. 85-701

Federal Election Commission
Appellant,

v.

Massachusetts Citizens for Life, Inc.
Appellee,

On Appeal from the United States
Court of Appeals for the First Circuit

BRIEF AMICI CURIAE OF THE AMERICAN
CIVIL LIBERTIES UNION AND THE CIVIL
LIBERTIES UNION OF MASSACHUSETTS
IN SUPPORT OF APPELLEE MASSACHUSETTS
CITIZENS FOR LIFE

INTEREST OF THE AMICI

The American Civil Liberties Union, Inc. (ACLU) is a non-profit corporation with approximately 250,000 members nationwide. For over 60 years, it has devoted itself to defending the civil rights and liberties guaranteed by the United States Constitution. The Civil Liberties Union of Massachusetts (CLUM) is a state affiliate of the ACLU.

CLUM and ACLU throughout their history have been primarily concerned with defending the related First Amendment rights of political speech and association. Both organizations have provided direct representation or participated as amicus curiae in numerous cases before this Court, as well as state and lower federal courts, involving these most fundamental of constitutional rights.

CLUM and ACLU also have a specific institutional interest in this case because the interpretation of federal election law urged by the Federal Election Commission (FEC), affects all advocacy organizations, including ACLU, which publish and rate the voting records of legislators. See the affidavit of CLUM Executive Director

John Roberts, J.A. 182-84.¹ This form of political communication is crucial in a democracy, and poses no threat to any public interest that would justify prohibition or burdensome regulation.

¹J.A refers to the Joint Appendix; J.S.A to the Jurisdictional Statement Appendix; and S.A. to the Supplemental Appendix filed by Massachusetts Citizens for Life (MCFL).

The affidavit of John Roberts demonstrates that both ACLU (which is incorporated) and CLUM (which is not) regularly publish and rate, with a plus or minus sign, the voting records of legislators on key civil liberties issues, particularly during election years when voter interest is at its height. Consistent with ACLU bylaws, neither organization may endorse candidates for political office or establish political committees within the meaning of the Federal Election Campaign Act. J.A. 183-84, ¶¶5-6; 37-38, ¶19 (findings by federal district court in FEC v. Central L.I. TRIM, 616 F.2d 45 (2d Cir. 1980), which were made part of the record in the present case).

STATEMENT OF THE CASE

A. Facts and Proceedings

MCFL is a nonprofit corporation whose sole purpose is to oppose the constitutional right of a pregnant woman to choose abortion (J.A. 83-84, 93). Through a variety of political activities, including publication of its newsletter, MCFL has sought to persuade the public and its elected representatives to oppose the right to reproductive choice and to outlaw abortion (J.A. 85-87).

The MCFL newsletter has been published regularly since 1973, finances permitting (J.A. 88). Since the second edition in April 1973, the MCFL newsletter periodically informed its readers of the positions taken or votes cast by legislators on abortion-related

issues, often but not always in the form of special election editions. For example, regular editions of the newsletter frequently reported legislators' positions or voting records, and commended some votes, while noting that MCFL endorses no candidate in particular (S.A. B: 1b, p.4; 1c, p. 5; 2a, pp. 4-5; 2b, p. 2; 3e, pp. 1-3; 3f, p. 2; 3g, p. 4; 3h, p. 3; 4e, p. 1; 4g, pp. 1-4; 5b, pp. 1-3; 5c, pp. 2-3; 5d, pp. 2-3; 6a, p. 5; 6b, p. 4). Special election editions in 1973 through 1978 urged readers to vote "pro-life," reported legislators' records in tabulated form, and advised that MCFL did not endorse any candidate or party (S.A. B: 2c, 2e, 4a, 4f, 4h, 5e, 6c, 6e).

In July 1979 the FEC notified MCFL that it was investigating possible

violations of various sections of the federal election law in connection with the publication of the September 1978 newsletter (S.A. B: 6c; Record at 326-27). In March 1982 the FEC filed a complaint against MCFL in federal district court, alleging that the September 1978 edition of the newsletter violated 2 U.S.C. §441b(a) (J.A. 1). The District Court entered summary judgment for MCFL, ruling that the newsletter was not covered by §441b; the Court of Appeals affirmed, holding that the newsletter was covered, but that §441b was unconstitutional as applied to this type of issue advocacy.

The September 1978 MCFL newsletter carried the headline "Everything You Need to Know to Vote Pro-Life" (S.A. B: 6c, p. 1). The inside pages provided voting record information on those

candidates in primary elections for United States Senate and House of Representatives, Massachusetts Senate and House, and Governor, who had served in elective office (id. at 2-8). Where the candidate had not previously held elective office and so had no voting record, or had not answered MCFL's questionnaire, the absence of relevant information was also noted. The back page again urged a "pro-life" vote and stated, "This special election edition does not represent an endorsement of any particular candidate" (id. at 8).

The MCFL special election edition resembled in substantive content, if not in tone and style, the communications of other nonprofit advocacy corporations regarding legislators' and candidates' positions on political issues. Judge Pratt in the TRIM case, for example,

found that the U.S. Chamber of Commerce, Inc., the United Church of Christ, and Public Citizen, Inc. make it a practice to publicize, explain, and praise or criticize legislative votes in efforts to inform the electorate and make legislators accountable to it (J.A. 42-53).² The United Church of Christ views its publication as part of its religious ministry (J.A. 48, ¶17).

² The Chamber of Commerce's activity apparently ceased in 1978 after the FEC issued an Advisory Opinion that distribution of its publication, "How They Voted," to the public or local chamber affiliates would violate §441b "since the publication was prepared at the expense of the Chamber which is itself incorporated..." Dissenting, Commissioner Aikens wrote that the Commission's opinion effectively "insulat[ed] elective representatives from the sometimes uncomfortable experience of having their positions on issues, as manifested by their votes in Congress, compared to the positions of various public organizations" (J.A. 42-43, ¶¶4, 5).

Public Citizen has published a Voting Index and well as "profiles" of selected members of Congress evaluating their performance (J.A. 49-53). Americans for Democratic Action, Americans for Constitutional Action, and the American Conservative Union also rate legislators on key issues (J.A. 53-54).

The importance of rating and publicizing legislators' votes was explained in the TRIM case by Reverend Barry Lynn of the United Church of Christ:

Some [legislative] decisions are very complicated. Motions are hidden in huge appropriation bills. The most important thing in a bill might be an amendment to the bill that never gets reported at all in the newspapers. If [our members] are going to be informed people making issue-decisions, then I think they need publications like this; and many of our members are not members of the National Taxpayers Union, or the ACLU, or Common Cause, or anybody else. This is the way that they get information on public policy issues,

and this is the way that get information on the votes taken by members of the Congress, so that they can have healthy dialogue at any time of the year that they have a chance to talk to their elected officials.

J.A. 48-49, ¶18.

B. Historical Background

It is important in understanding the issues here to review the FEC's position as it has evolved in these proceedings as well as in prior attempts over the past fourteen years to regulate or prohibit political advocacy. In this case the Commission argued to the lower courts that MCFL's communications were prohibited by 2 U.S.C. §441b regardless of whether they constituted "express advocacy" of the election or defeat of any candidate. See FEC Brief to U.S. Court of Appeals, 15-21. The Commission urged in the alternative that the MCFL

newsletter was express advocacy because it did not disseminate candidates' positions "in a non-partisan fashion." Id. at 16.

The District Court rejected the FEC's argument that the MCFL newsletter constituted express advocacy. The Court of Appeals accepted the argument, but held that §441b still could not constitutionally be applied to MCFL's communications.

Responding to the Court of Appeals' invalidation of 2 U.S.C. §441b insofar as it applied to nonprofit issue advocacy corporations like MCFL, the FEC now urges this Court to reverse on two grounds: first, that applying §441b to the MCFL newsletter does not offend the First Amendment; and second, that even if exempted from §441b, MCFL would still be subject to federal regulation as a

"political committee" under 2 U.S.C. §431(4)(A). Brief at 25-26. In making this latter claim the Commission does nothing to overcome the constitutional impediments to prohibition or regulation of the type of informative advocacy involved here, and it revives a line of argument that has been consistently rejected by federal courts over the last fourteen years.

In the first suit brought under the new FECA of 1971, the FEC argued that an organization that paid for an advertisement calling for the impeachment of the President, and praising legislators who advocated impeachment, was a political committee within the meaning of the statute, because the ad was a partisan communication "for the purpose of influencing the outcome of the 1972

election." The Commission asked the court to enjoin the committee from receiving funds or making expenditures unless it complied with the filing and reporting requirements of the Act. U.S. v. National Committee for Impeachment, 469 F.2d 1135 (2nd Cir. 1972).

The Court of Appeals rejected the government's arguments as promoting the "abhorrent" and "intolerable" consequence of "regulating the expression of opinion on fundamental issues of the day." Id. at 1142. The court insisted that a "political committee" must have as its major purpose the nomination or election of a candidate. Id. at 1141.

In ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973), vacated as moot sub nom. Staats v. ACLU, 422 U.S. 1030 (1975), the Commission again took the position that advocacy groups were subject to

election law regulation when they published an advertisement listing 102 Congressmen in an "honor roll" and derogating the Nixon Administration's opposition to court-ordered busing. The court rejected the FEC's position, reminding the agency that "[a]ny attempt to restrict the free and unfettered dissemination of such opinions cannot be favorably viewed," id. at 1051, and concurring in the Second Circuit's definition of "political committee" in National Committee for Impeachment. Id. at 1057.

Congress then amended the Act by adding §437a, which stretched reporting and disclosure requirements to cover speech by nonpartisan groups "designed" to influence an election by "setting forth the candidate's position on any public issue, his voting record, or

other official acts." This new section bore uncanny resemblance to the FEC's current construction of 441b. It was soon held unconstitutional because unnecessarily infringing on First Amendment rights of speech and political association. Buckley v. Valeo, 519 F.2d 821, 869-78 (D.C. Cir. 1975), affirmed in part and reversed in part on other issues, 424 U.S. 1 (1976). In language directly applicable to the present case, Judge Tamm, concurring, wrote:

Under this section, plaintiff American Civil Liberties Union must disclose its contributors and expenditures since it publishes a membership newsletter with voting records on civil liberties issues....Under this section a similar requirement would be placed on a Right-to-Life group who places a newspaper advertisement calling for the election of all candidates who support an anti-abortion constitutional amendment.

I can hardly imagine a more sweeping abridgement of first amendment associational rights. Section 437a

creates a situation whereby a group contributes to the political dialog in this country only at the severest cost to their associational liberties. I can conceive of no governmental interest that requires such sweeping disclosure of all groups who take a stand on a public issue or report voting records...

519 F.2d at 914 (emphasis added).

The FEC did not appeal this Court of Appeals ruling, although the Supreme Court reviewed other questions raised in Buckley; and §437a was later repealed.

It might have been thought that the Buckley decisions and Congressional repeal of §437a conclusively disposed of the argument advanced here by the FEC, that organizations whose only connection with the electoral process is independent discussion and issue advocacy may be subjected to government controls under the FECA, and prohibited from speaking entirely if they do not submit. However, in FEC v. AFSCME, 471

F.Supp. 315 (D.D.C. 1979), the Commission sued a union which had circulated a "Nixon-Ford" poster in 1976, alleging violation of the disclosure requirements of what was then 2 U.S.C.

§431(f)(4)(C). Adopting this Court's interpretation in Buckley of then-§434(e), the district court held that to fall within the regulated zone, the communication must not "be 'primarily devoted to subjects other than the express advocacy of the election or defeat' of a clearly identified candidate." Id. at 316. Although the poster "may have tended to influence voting," it contained "communication on a public issue widely debated during the campaign" (President Ford's pardon of former President Nixon), and thus "is the type of political speech which is protected from

regulation." Id. at 317.

Finally, in FEC v. Central Long Island TRIM, supra, 616 F.2d 45, the FEC sued a tax reform committee that published pamphlets setting out a local Congressman's record on tax and spending issues. The Commission argued that the pamphlets were not produced for the purpose of informing the public about the voting record of a government official, but were intended to unseat "big spenders," and were therefore subject to regulation. Id. at 53. The court noted that the FEC's interpretation would broaden sections 434(e) and 441d, from regulation of expenditures "expressly advocating" election or defeat, to government oversight of all communications made "for the purpose, express or implied, of encouraging election or defeat." Id.

(emphasis in original). The court rejected this position as "totally meritless." Id. Chief Judge Kaufman, concurring, added:

[T]he insensitivity to First Amendment values displayed by the Federal Election Commission...in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act....

It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues....The First Amendment presupposes that free expression, without government regulation, is the best method of fostering an informed electorate.... Thus, courts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public.

616 F.2d at 53-54 (emphasis in original).

SUMMARY OF ARGUMENT

Although the District Court and the Court of Appeals followed different paths, they reached the same necessary

result: 2 U.S.C. §441b cannot constitutionally be applied to the communications at issue in this case. Both courts recognized that the FEC's attempt to ban the newsletter unless MCPL subjected itself to detailed regulation by establishing a "segregated fund" struck at the very core of the First Amendment.

Before this Court, the FEC continues to ignore the magnitude of the constitutional right involved here. Communicating with the voting public about the views and actions of its elected representatives on political issues of pressing national concern is certainly among the most fundamental rights in a democracy, and associating together, whether in corporate form or otherwise, to amplify such communications is equally entitled to

the highest level of constitutional protection.

The FEC contends that §441b does not prohibit political speech but only commands that it flow from a separate "segregated fund." It then attempts to minimize the burdens that the regulatory scheme imposes on such funds. But the facts of this and prior election law cases, and the requirements of the statute itself, suggest otherwise. Applying §441b will silence political speech entirely in many instances, while unduly and unnecessarily burdening its exercise in others.

As the Court of Appeals correctly observed, the FEC has pointed to no compelling governmental interest justifying the application of §441b in this case. Neither corruption nor the fear that members' contributions will be

misspent constitutes a realistic danger in this context. Thus, the First Amendment demands that the advocacy at issue here remain free.³

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE PUBLICATION AND EVALUATION OF LEGISLATORS' VOTING RECORDS, AND GOVERNMENT MAY NEITHER PROHIBIT SUCH PUBLICATION NOR SUBJECT THE PUBLISHERS TO DETAILED AND BURDENSOME REGULATION.

The FEC contends that 2 U.S.C. §441b prohibits MCFL and similar organizations from publishing materials such as appear in the newsletter unless they form separate segregated funds and submit to

³By confining this brief to the constitutional issues, amici do not mean to suggest that 2 U.S.C. §441b is not capable of a limiting construction, as urged by MCFL and adopted by the District Court.

detailed reporting and disclosure requirements. The agency argues both that the Court ought to evaluate the constitutional rights at issue here by a deferential standard (Brief at 19-20), and that the regulatory requirements imposed by the Federal Election Campaign Act are minimal (Brief at 20-28). The FEC is wrong on both counts.

A. Publication and Evaluation of Legislators' Voting Records is Political Speech Entitled to the Most Rigorous Constitutional Protection.

The political advocacy at issue here merits the most stringent constitutional protection. "[F]ree public discussion of the stewardship of public officials" is a "fundamental principle of the American form of government." New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964). As this Court has repeatedly observed, "[d]iscussion of public issues

and debate on the qualifications of candidates are integral to the operation" of the American constitutional system, Buckley v. Valeo, 424 U.S. 1, 14 (1976), and have "always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980).

This pivotal right in our constitutional system applies with equal force to individuals and to advocacy organizations that are formed to amplify the voices of their members. Federal Election Comm'n v. National Conservative Political Action Comm., 105 S.Ct. 1459, 1467 (1985)(NCPAC); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, supra, 424 U.S. at 15, 22; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460

(1958). "'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'" NAACP v. Claiborne Hardware 458 U.S. 886, 908 (1982), quoting NAACP v. Alabama, supra, 357 U.S. at 460.

Establishment of an advocacy organization in corporate form in no way diminishes the level of constitutional solicitude with which the organization's political speech must be viewed. Indeed, the NAACP, a party in many landmark decisions recognizing the First Amendment right of association, is a New York membership corporation. See Claiborne Hardware, supra, 458 U.S. at

889. Corporate status alone does not reduce either the "inherent worth" or the constitutional importance of political speech "indispensable to decisionmaking in a democracy." First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978). See also Pacific Gas & Electric Co. v. Public Utilities Comm'n, 106 S.Ct. 903, 907 (1986).

The FEC thus errs when it denigrates the important First Amendment rights at stake here by urging the Court to apply a deferential standard of review to the presumed legislative judgments that all campaign speech, if originating in an incorporated organization, must be subject to a level of regulation which in many cases will amount to a prohibition, and that publication and rating of candidates' voting records constitutes campaign speech. FEC Brief

at 19-20. The FEC's reliance on this Court's decision in Federal Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 207-11 (1982) (NRWC), is equally inappropriate since that case involved a nonprofit corporation's solicitation of contributions on behalf of federal candidates, not its independent expenditure of funds to disseminate information and political advocacy directly to the public. See NCPAC, supra, 105 S.Ct. at 1468, reaffirming this crucial distinction between the First Amendment status of contributions and independent expenditures, as articulated in Buckley, 424 U.S. at 47-48, and California Medical Ass'n v. FEC, 453 U.S. 182, 195 (1981).

B. Forced Reporting and Disclosure on the Level Required by the FECA Unduly Chills and Threatens the First Amendment Rights of Issue-Oriented Advocacy Organizations.

The FEC contends that forcing MCFL and similarly-situated organizations to establish segregated funds or otherwise register as political committees would impose only a minimal burden on First Amendment rights. This argument ignores both the substantial imposition, and offensiveness to free speech, that a system of government licensing, control, and disclosure involves, and the reality that many organizations will curtail their political speech if the Commission's view prevails.

Under 2 U.S.C. §432, all political committees (including segregated funds) must adhere to specific organizational rules and accounting procedures.

Section 433 requires every such committee to register, and file information about its organization and finances, with the FEC.

Section 434 governs reporting and disclosure. Political committees must file reports of receipts and disbursements at specified intervals (§434(a)(1),(4)). The reports must disclose the identity of each person who makes a contribution, loan, or refund of expenditures in an amount above \$200 (§434(b)(3)(A),(E),(F),(G)), as well as the amount and recipient of all disbursements, including "independent expenditures" (§434(b)(4)(H)(iii); §434(b)(5)(A),(D),(E)).

This Court first recognized in NAACP v. Alabama that government-mandated disclosure of the identities of members

of advocacy organizations, particularly organizations asserting unpopular viewpoints or defending the interests of minorities, threatens to chill dramatically the exercise of the First Amendment rights of political speech and association. See also Bates v. Little Rock, 361 U.S. 516, 524 (1960) (making public an organization's membership list constitutes "substantial abridgement of associational freedom"); Shelton v. Tucker, 364 U.S. 479, 486 (1960) (noting "pressure" on citizens to avoid organizational ties that might displease employers or public). The Court fully reaffirmed this principle in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982):

The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief

guaranteed by the First Amendment." Buckley v. Valeo, supra, 424 U.S. at 64..., citing Gibson v. Florida Legislative Comm., 372 U.S. 539..., NAACP v. Button, 371 U.S. 415... "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama, supra, 357 U.S. at 462... The right to privacy in one's political association and beliefs will yield only to a "subordinating interest of the State [that is] compelling," NAACP v. Alabama, supra, 357 U.S. at 463...(quoting Sweezy v. New Hampshire, 354 U.S. 234, 265...(1957) (concurring opinion)), and then only if there is a "substantial relation between the information sought and [an] overriding and compelling state interest." Gibson v. Florida Legislative Comm., supra, 372 U.S. at 546...

Id. at 91-92.

In the present context, it is not only the reporting to the government of members' identities that chills and burdens the right to engage in political advocacy, and particularly in criticism of public officials. 2 U.S.C. §432

contains additional requirements that organizations register and file extensive financial information in order to exercise First Amendment freedoms, and that they conform organizationally to the statutory rules and accounting procedures. Applying these requirements to issue advocacy organizations, as urged by the FEC, amounts to a constitutionally impermissible system of licensing. Cf. Freedman v. Maryland, 380 U.S. 51, 58 (1965); Speiser v. Randall, 357 U.S. 513, 520-25 (1958). As this Court very recently noted in the context of an overly burdensome procedural scheme, "first amendment rights are fragile and can be destroyed by insensitive procedures." Chicago Teachers Union, Local No. 1 v. Hudson, 54 U.S.L.W. 4231, 4234 n.12 (March 4, 1986), quoting Monaghan, "First

Amendment Due Process," 83 Harv.L.Rev. 518, 551 (1970).

In many instances, moreover, as in the case of CLUM and ACLU, an organization could not, consistently with its own bylaws, register as a political committee. See affidavit of John Roberts, J.A. 183-84; TRIM Findings, J.A. 37-38; Court of Appeals decision, J.S.A. 21a n.7; Buckley v. Valeo, supra, 519 F.2d at 871. For the ACLU as for many issue-centered organizations, nonpartisanship is a principle that cannot be compromised. See also ACLU v. Jennings, supra, 366 F.Supp. at 1043 n.1.

Other organizations, regardless of their commitment to nonpartisan issue advocacy, will undoubtedly forego political speech rather than subject themselves to governmental reporting,

disclosure, and control, because of their concern for associational privacy or fear of subjecting their members to reprisal. This response, of course, is most likely to occur among unpopular organizations, particularly those representing dissenting or minority views. Cf. Buckley, 424 U.S. at 42-45 (noting chilling effect of broad application of FECA language). But these dissident voices are often the ones that need most urgently to be heard. The FEC's reading of §441b, if upheld, would not only seriously burden speech and make it less free; it would in many cases silence it entirely. Because there is no compelling public interest to be served by such a licensing or regulatory scheme (see section II, infra), application of §441b

to MCFL would be unconstitutional.⁴

⁴The Commission mistakenly relies upon Regan v. Taxation with Representation, 461 U.S. 540 (1983), for its argument that requiring the creation of a separate regulated entity for political advocacy is constitutionally permissible. Regan, however, concerned qualification for a government subsidy -- tax deductibility -- rather than limitations on the right to speak. If the organization chose not to comply with the regulatory scheme, the penalty would not be prosecution or silence, but only loss of a marginal increment in the extent to which the government subsidized its activity. Id. at 544. Moreover, the requirement of establishing a separate entity for lobbying purposes, in order to preserve the tax subsidy of deductibility of contributions, did not carry with it the burdensome baggage associated with FECA reporting, disclosure, and control. Id. at 544-45 n.6. As the Court noted in Regan (in contrast to the present case), the government "has not infringed any First Amendment rights or regulated any First Amendment activity." Id. at 546 (emphasis added).

C. The Commission's Attempt to Distinguish MCFL's Newsletter From Less Aggressive Issue-Oriented Political Advocacy is not Workable and Would Vest an Intolerable Degree of Discretion in Government Regulators.

The Commission's emphasis on the "vote pro-life" advocacy that accompanied MCFL's publication and evaluation of voting records, Brief at 3-5, is presumably intended to suggest to the Court that MCFL somehow crossed a line between communications that cannot constitutionally be prohibited or regulated and those that can. But the Commission's own practice makes clear that such an attempted distinction is fraught with constitutional difficulty, while its very imprecision would deter political speech as organizations attempt to "steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly

marked." Speiser v. Randall, supra, 357 U.S. at 526.

In its regulations, for example, the agency views as "partisan" an incorporated organization's publication of voter guides if they "suggest or favor any position on the issue covered." 11 CFR §114.4(b)(5)(C). Similarly, the Commission has issued advisory opinions condemning publication of legislators' voting records by the Chamber of Commerce and United States Defense Committee, because approval or disapproval of the votes was indicated. FEC AO-1978-18, CCH Federal Election Campaign Financing Guide ¶5305 (1978); FEC AO-1984-14, CCH Federal Election Campaign Financing Guide ¶5761 (1984).

The Commission ruled the other way, however, in approving a voter guide published by Right to Life of Greater

Cincinnati, Inc., because, the agency said, the description of voting records in that instance was "issue-oriented and not election-oriented or candidate-oriented." FEC AO-1984-17, CCH Federal Election Campaign Financing Guide ¶5769 (1984).

Distinctions like these are illusory and fail to put advocacy organizations on reasonable notice of what they may or may not publish. Permitting the agency to prosecute an organization engaged in political advocacy on the basis of its perception that such clearly issue-centered productions as the Chamber of Commerce or MCFL newsletter are really candidate-centered, or of factors such as style or tone of presentation, inclusion of photographs or clip-out forms, or exhortations to "vote pro-life," would vest an intolerable

degree of prosecutorial discretion in government agents. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (unbridled discretion); Cox v. Louisiana (Cox I), 379 U.S. 536, 557-58 (1965) (same); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980) (chilling effect). See also FEC v. Central L.I. TRIM, supra, 616 F.2d at 52-53; U.S. v. National Comm. for Impeachment, supra, 469 F.2d at 1140-42. The result of such a system, inevitably, is that First Amendment speech and associational rights would be chilled both by too-zealous or unpredictable enforcement, and by understandable timorousness on the part of issue-advocacy groups. Cf. In re Primus, 436 U.S. 413, 432 (1978); Smith v. Goguen, 415 U.S. 566, 573 (1974);

Speiser v. Randall, supra, 357 U.S. at 526. The FEC's efforts to distinguish the MCFL newsletter from other voting record publications are thus unpersuasive and only highlight the constitutional impediments to the agency's proposed enforcement scheme.

II. THE FEC HAS SHOWN NO COMPELLING STATE INTEREST JUSTIFYING ITS PROHIBITION OR BURDENSOME REGULATION OF POLITICAL SPEECH.

This Court has repeatedly emphasized the exacting burden that the government must meet in seeking to justify a restriction on First Amendment freedoms. The restriction must "be demonstrably supported not only by a legitimate state interest but a compelling one," and it must "operate without unnecessarily circumscribing protected expression." Brown v.

Hartlage, 456 U.S. 45, 53-54 (1982).

"Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530 (1945).

The justifications offered by the government, moreover, must be scrutinized in each case to determine if the abuse that they are designed to combat is really present, or likely to be present, in the speech that is sought to be restricted or suppressed. Thus, in Brown v. Hartlage, supra, the asserted compelling interest in preventing politically corrupt bargains between candidates and voters was simply not advanced by punishing a candidate who promised the electorate as a whole that he would serve at a reduced salary. 456 U.S. at 55-58. Similarly, in First National Bank v. Bellotti,

supra, the compelling need to avoid corruption or its appearance in candidate elections had no application to issue-oriented referendum campaigns. 435 U.S. at 788 n.26.

The FEC urges that isolated language in this Court's recent NRWC opinion, 459 U.S. at 210 ("[n]or will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"), introduces a more relaxed standard. FEC Brief at 23. But, as noted, the NRWC case involved not core political advocacy but the solicitation of contributions to a segregated fund for the specific purpose of supporting federal candidates in the narrow sense found to be constitutionally permissible in Buckley. "Buckley identified a single narrow exception to the rule that

limits on political activity were contrary to the First Amendment." Citizens Against Rent Control v. Berkeley, supra, 454 U.S. at 296-97 (emphasis added).

The "single narrow exception" recognized in Buckley was the danger of "actual or potential corruption." California Medical Association v. FEC, supra, 453 U.S. at 203 (Blackmun, J. concurring); Buckley, 424 U.S. at 26. While that danger was "sufficient to justify the regulation at issue" in NRWC, governing solicitation of contributions for the express partisan purpose of supporting candidates, it plainly has no application to political opinions on issues, and information about candidates' positions on those issues, proffered by nonpartisan advocacy organizations. Here, even more

so than in NCPAC, 105 S.Ct. at 1469, there is no danger of an advocacy organization's corrupting quid pro quo with a federal candidate:

"The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACS [or, as in the present case, nonprofit incorporated advocacy groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view....[H]ere, as in Buckley, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Id. at 1469. See also Buckley, 424 U.S. at 47.

Thus, unless the FEC has demonstrated that the speech at issue has the same

corrupting influence as do large political contributions to candidates' campaigns, the language of NRWC is inapplicable. Publicizing and rating candidates' votes and positions on major political issues tends to hold politicians accountable not for wrong or corrupt reasons but for precisely the right reasons, and not to individuals, businesses or unions pursuing their private interests, but to the electorate as a whole.

The other interest sometimes said to be served by §441b is protection of individuals "who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208. That interest, however, has no relevance in

the case of a nonprofit advocacy organization whose sole purpose is to further stated political goals, and which is supported not by union dues or shareholder investment but by membership fees from individuals who expressly share those goals.

The Commission's attempt to invent a possible conflict between members or contributors and the ideological organizations which they support (FEC Brief at 31-33) deserves high marks for imagination but is entirely speculative as well as logically flawed. Inherent in any advocacy organization formed to amplify the political views of its members is a degree of delegation to the officers of the organization to decide exactly how these views should be amplified and therefore contributors' money should be spent. Members or

contributors may disagree with a particular tactical judgment of this type without having their wills overborne in the same sense that union members or shareholders do when their funds are misused for political purposes.

In the difficult area of campaign finance, the sometimes competing concerns for free expression and fair elections must be analyzed in each case to determine whether risks actually exist which justify infringement of constitutional rights. Where, as in the present action, the advocacy is issue-centered and not controlled by or connected to a candidate, no public interest is served by subjecting MCFL and similar organizations to prosecution, bans, civil penalties, or

government regulation so pervasive and intrusive that it will invade precious associational rights and in some instances silence speech entirely. On the contrary, this Court should recognize that grave and intolerable dangers to our democratic system inhere in the FEC's position that advocacy of the MCPL type may be prohibited unless organizations submit to a detailed and burdensome regulatory scheme.

CONCLUSION

For the foregoing reasons the FEC's reading of §441b should be rejected and

the judgment of the Court of Appeals affirmed.

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April 4, 1986

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12
No. 85-701

In The Supreme Court
Of The United States

October Term 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS
FOR LIFE, INC.,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE,
HOME BUILDERS ASSOCIATION
OF MASSACHUSETTS, IN SUPPORT OF
APPELLEE.

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57104

QUESTION PRESENTED

Whether 2 U.S.C. s.441b can be applied to prohibit corporate expenditures for the publication of political information and ideas on public issues -- without approval of or coordination with any candidate's campaign, and without endorsing any particular candidate -- and if so, whether such application violates the First Amendment freedoms of speech and association?

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OF MASSACHUSETTS, IN SUPPORT OF
APPELLEE.

1

STATEMENT OF INTEREST
OF AMICUS CURIAE

The Home Builders Association of Massachusetts (hereinafter the Association) is a non-profit tax exempt corporation organized under the laws of the Commonwealth of Massachusetts for the purpose of articulating the position of the home building industry on any matter which affects the ability of the industry to produce housing for all citizens of the Commonwealth. Among its many activities, the Association monitors federal, state, and local government issues which may have an impact on the home building industry and its ability to provide housing opportunities to the public.

In order to fulfill its objectives the Association periodically prepares, prints and distributes a newsletter. As well as notifying its members of other information integral to the building trade, the newsletter also includes summaries of proposed legislation at the state

level which could affect the home building business. These summaries include critiques of those legislators who support or oppose important bills.

The Association desires to expand its newsletter to include reference to federal as well as state activity. Such reference may well include publication of the voting records or positions of federal candidates. As a result, the Association is likely to confront issues identical to those presented in the instant suit.

The Home Builders Association of Massachusetts, therefore, has a vital interest in presenting to the Court its position on the issues involved, by the filing of its brief amicus curiae in support of the Appellee in this action.

STATEMENT OF THE CASE

The case is before the Court on an appeal by the Federal Election Commission (hereinafter FEC) from a judgment of the United States Court of Appeals for the First Circuit. The action was initiated in the District Court by the FEC which alleged that the Massachusetts Citizens For Life (hereinafter MCFL) a non-profit corporation, violated 2 U.S.C. s.441b(a) by using corporate funds to prepare, print and distribute a special election edition of its newsletter to members of the general public.

The special edition newsletter at issue was published prior to a primary election held on September 19, 1978. The cost of the publication and a subsequent redistribution of a re-edited version of the newsletter was \$9,812.76. Both versions listed all candidates in the primary election for federal and state offices and reported their positions on three pro-life issues: a constitutional human life amendment, legislation

to prohibit the use of tax funds for abortions, and legislation to provide positive alternatives to abortion. While the publication did urge readers to vote "pro-life," it also stated that "(T)he Mass. Citizens For Life election survey is an educational service to help you cast an informed vote when you go to the polls on September 19th." Moreover, it included a specific disclaimer that, "(T)his special election edition does not represent an endorsement of any particular candidate."

Following cross-motions for summary judgment, the District Court issued an opinion on June 29, 1984 in which it dismissed the FEC's complaint. The District Court concluded that the MCFL did not violate s.441b(a) because the newsletter in dispute was exempted from the definition of expenditure as a periodical publication. In the alternative, the Court found that the application of s.441b(a) to the newsletter of the non-profit issue-oriented

corporation would violate its rights to freedom of speech, press and association under the First Amendment of the United States Constitution.

The Court of Appeals affirmed the District Court's ruling solely on the constitutional grounds. The Court found the statutory definition of "expenditure" to be ambiguous and turned to the legislative history of the Act. Based upon its interpretation of the legislative history the Court concluded that MCFL'S publication of the special edition newspaper was within the ambit of prohibited expenditures under s.441b(a).

The court found, however, that the statute provided a context-based restriction on speech, permissible under the First Amendment only when narrowly drawn to achieve a compelling governmental interest and that the FEC had failed to satisfy this requirement in prohibiting MCFL'S expenditures for publication of its Special Election Editions. Therefore, the Court concluded that the application of s.441b(a) to indirect,

uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates is a violation of that organization's First Amendment rights.

SUMMARY OF ARGUMENT

I. The Publication of The MCFL Newsletter is Not An Expenditure in Connection With a Federal Election Within the Meaning of 2 U.S.C. s.441b.

The Federal Election Campaign Act, at 2 U.S.C. s.441b which generally prohibits corporations from making a contribution or expenditure in connection with a federal election, must be read in context with s.441b(2), which limits the prohibition to those expenditures or contributions which are made to a candidate, campaign committee or political party. The statutory language provided in these sections is not ambiguous. Consequently, it is unnecessary to resort to an examination of the legislative history of the Federal Election Campaign Act in order to interpret the statute. Furthermore, incorporating the general definitional section of the Act into section 441b, as the FEC

advocates, improperly negates the specific statutory language contained in that section.

A violation of s.441b, is made out only if a corporation expends funds for the purpose of expressly advocating the election or defeat of a candidate. Since the MCFL Newsletter was published solely for educational purposes, and not to endorse specifically named candidates, the publication did not constitute an expenditure in violation of the Act.

II. The Prohibition Against Corporate Expenditures in Connection With a Federal Election is Unconstitutionally Vague.

As the Court of Appeals held, the restriction on corporate expenditures in the Federal Election Campaign Act constitutes a content-based restriction on free speech. The term "in connection with" a Federal Election, as it is interpreted and applied by the FEC, is unconstitutionally vague, as it does not adequately forewarn and describe the parameters of

prohibited conduct. Continued prosecutions by the FEC based solely upon this standardless term will chill constitutionally protected speech.

III. The MCFL Publication is Protected By The First Amendment Guarantees Of Free Speech and Association.

The First Amendment guarantees not only the right to speak but also the right to publish, circulate or distribute that speech. This right does not depend upon the individual or corporate identity of the speaker, because the right to associate, in corporate or any other form, in order to advance an ideological cause is similarly protected by the First Amendment. Any restriction placed upon this constitutionally guaranteed right must be narrowly drawn to serve a compelling governmental interest.

IV. The FEC Has Failed to Demonstrate a Compelling Government Interest Sufficient to Justify Prohibiting the MCFL Publication.

The FEC has failed to demonstrate a compelling governmental interest in prohibiting the MCFL publication. Under the standards set by this Court, the FEC may justify its broad interpretation of the Act's prohibitions only if such interpretation is required to prevent corruption, or the appearance of corruption, in the electoral process. MCFL's publication represented an expenditure independent from, and uncoordinated with, any candidate or political party. Such expenditure could not corrupt an election, since the opportunity for the corporation to exact a political debt from a candidate was nonexistent. Therefore, the broad restriction against the corporate expenditures at issue in this case violates the constitutional protections of free speech and association.

ARGUMENT

I. THE PUBLICATION OF THE MCFL NEWSLETTER IS NOT AN EXPENDITURE IN CONNECTION WITH A FEDERAL ELECTION WITHIN THE MEANING OF 2 U.S.C. s.441b.

A. Section 441b Does Not Prohibit Corporate Contributions or Expenditures Not Made to Candidates, Campaign Committees, or Political Parties or Organizations.

Pursuant to 2 U.S.C. s.441b(a), it is unlawful for any corporation to make a "contribution or expenditure" in connection with any federal election. The operative phrase is defined as follows:

(F)or the purpose of this section ... the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization in connection with any election to any of the offices referred to in this section ... 2 U.S.C. s.441b(b)(2) (emphasis added).

According to the very terms of the statute, therefore, a corporation is not prohibited from expending funds in connection with a federal election unless those funds are targeted to the election or defeat of a specific candidate, committee, party, or organization.

The Complaint against the Massachusetts Citizens for Life (MCFL) brought by the Federal Election Commission (FEC) in this action alleges that the non-profit corporation expended funds "in connection with" an election, not that it contributed to a candidate, or that the expenditures for the newsletters were made to, in concert with, or approved by a named candidate. Absent an allegation which charges this nexus between an expenditure of funds and a particular candidate, there can be no finding that MCFL violated the federal election law.

The Court of Appeals erroneously held, despite the wording of the statute, that the definition of contribution or expenditure appearing in

s.441b(b)(2) is not inclusive. While acknowledging that the starting point in every question of statutory construction is necessarily the statute itself, the Court found some ambiguity in the statute, and, consequently chose to examine the legislative history surrounding the Federal Election Act. Regardless of the specific statutory limitation on the term "contributions or expenditures" stated in s.441b(b)(2), the Court concluded that the prohibition against corporate expenditures must be expanded to include the broader definition of the word "expenditure" which is found in the general definitions section of the Act. This broader definition prohibits, "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" 2 U.S.C. s.431(9)(A) (1982). (emphasis added)

Not only does the lower Court's interpretation of the Act violate the acknowledged principle,

that statutory construction must, where possible, rely exclusively on the plain meaning of statute itself, but it also ignores the clear conditioning statement in s.431(9)(B)(v) that the term "expenditure" does not include -

any payment or obligation incurred by a corporation or labor organization which, under s.441b(b) would not constitute an expenditure by such corporation or labor organization.

Thus, an interpretation such as that of the Court of Appeals, which would incorporate the general definitional sections of the Federal Election Campaign Act into Section 441b, both negates this specific statutory provision and effectively denies the language of s.441b(2). A blanket prohibition against corporate expenditures intended to influence any election for federal office, would subsume and render surplus the more precisely drawn prohibition against corporate expenditures in behalf of a candidate, campaign committee or political party.

The plain language of the statute should not be contorted so as to nullify the narrowly written restrictions enumerated in s.441b.

B. Section 441b Prohibits Only Expenditures or Contributions Which Expressly Advocate the Election or Defeat of a Particular Candidate.

The purpose of the MCFL newsletter was to provide information to voters on the public issue of interest to the organization, and to encourage votes to be cast in furtherance of the organization's philosophy on that issue. No particular candidate was either endorsed or attacked. The statute, therefore, simply does not apply to such an informational issue-oriented publication.

The MCFL newsletters were published to provide an educational service and not to expressly advocate the election or defeat of a particular candidate. The newsletter specifically states "(T)he Massachusetts Citizens for Life election survey is an educational service to help you cast

an informed vote when you go to the polls on September 19th." To reinforce the impartial nature of the publication the final page of the newsletter stated, "(T)his special election edition does not represent an endorsement of any particular candidate." Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 15 (1985).

The identification of a candidate's views on a specified issue and an exhortation to vote according to a certain ideology do not violate the Federal Election Campaign Act. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court, in another context, set out an "express advocacy" requirement for an action to violate the statute. The Court asserted that the term "express advocacy" applies only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject,' etc." 424 U.S. at 44, n.52. The Court concluded,

[W]e construe 'expenditure' ... to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending which is unambiguously related to the campaign of a particular candidate. (footnote omitted). 424 U.S. at 80.

As both the District Court and the Court of Appeals found, the exhortation in the newsletter "Vote Pro-Life" does not "fit within the Buckley definition of express advocacy because it does not advocate the election of particular candidates for particular offices, but urges support of a general position on a controversial issue." FEC v. MCFL, 769 F.2d at 20.

Despite its conclusion on this point, the Court of Appeals proceeded, impermissibly to expand the Buckley definition, in holding the newsletter's general issue-oriented advocacy to be prohibited express advocacy. The Court of Appeals found the inclusion of the pictures of certain pro-life candidates and the statement that "your

vote in the primary will make the critical difference in electing pro-life candidates," transformed the mission of the newsletter from one of providing public information on a general issue to one of advocating the election of specific, identified candidates. The Court's reading of the purpose and effect of the newsletter is, however, misplaced.

It is true, as the Court of Appeals has stated, that only candidates who supported pro-life positions had pictures published in the newsletter. Yet, in the race for the United States Senate, two pro-life candidates were featured, and in the Fifth Congressional District race none of the pro-life candidates was represented photographically. Similarly, in the First Congressional District, Silvio Conte's picture was published even though he was an unopposed incumbent. The purpose of the publication was to advocate a particular ideology by informing the electorate which, if any,

candidates supported that ideology and not to promote the election of a particular candidate. The choice between two pro-life candidates, or between two pro-choice candidates, was left to the voters without any influence from MCFL.

In fact, the inclusion of a candidate's pro-life position in this publication may well have been a detriment rather than a benefit in his re-election campaign. As this Court has stated, independent expenditures made purportedly in support of a candidate may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. Buckley v. Valeo, 424 U.S. at 47; Common Cause v. Schmitt, 522 F. Supp. 489 (D. D.C. 1980), aff'd, 455 U.S. 129 (1982). The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Buckley, supra. at 47.

This point is amply illustrated by the MCFL publication. It is unknown whether any of the candidates listed in the newsletter desired their pro-life/pro-choice record or position to be an issue in their election campaign. In fact, the publication of a candidate's voting record on this issue is equally informative to a voter predisposed against pro-life issues, as to one who supports MCFL's position. Although one recipient of the MCFL newsletter may favored Howard Phillips, Democratic candidate for United States Senate in the 1978 primary, because of his pro-life record, another voter might be equally persuaded by the newsletter to vote for his opponent, Paul Tsongas upon learning of his pro-choice position. Indeed, as the opinion of the District Court noted, to the extent that the newsletter was distributed beyond defendant's membership, "it probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which,

according to public opinion polls, is opposed by most citizens." Federal Election Commission v. Massachusetts Citizens For Life, Inc. 589 F.Supp. 646, 649 (D. Mass. 1984).

The Federal Election Campaign Act was not intended to reach such impersonal (or multi-personal) advocacy, which serves only to inform the electorate on a public issue, leaving the choice among candidates still very clearly in the hands of the voters.

II. THE PROHIBITION AGAINST CORPORATE EXPENDITURES
IN CONNECTION WITH A FEDERAL ELECTION IS
UNCONSTITUTIONALLY VAGUE.

Pursuant to s.441b, a corporation is prohibited from making "expenditures or contributions" in "connection with a federal election." As has been discussed, there are significant questions concerning the definition of the word "expenditure" as it is used in the Federal Election Campaign Act. There is even greater uncertainty — which, particularly in the context of a content-based restriction on free-speech, presents an issue of constitutional proportions — over the meaning of the term "in connection with" any federal election as it is used in the prohibition against corporate expenditures. The amicus submits that the term, as interpreted and applied by the FEC, is unconstitutionally vague, as it cannot adequately

forewarn and describe the parameters of prohibited conduct. The term "in connection with" is not defined in the Act. Consequently, the FEC freely decides whether to prosecute an action based solely on its subjective view that a statement or publication may have a sufficient nexus with an election to have been "in connection with" that election. Civil penalties and/or criminal prosecution may be imposed, therefore, even though an association has no objective standards or criteria by which to determine the permissibility of its conduct under the statute. Other more precisely worded statutes have been invalidated as being unconstitutionally vague, and the FEC's reading must follow suit.

Nowhere are the constitutional implications of vagueness more dangerous than in the exercise of protected First Amendment rights. NAACP v. Button, 371 U.S. 415 (1963). "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit

the exercise of [those] freedoms,' ... Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden area were clearly marked." Buckley v. Valeo, 519 F. 2d 821, 874 (D.C. Cir. 1975) (en banc) (per curiam), aff'd in part rev'd in part, 424 U.S. 1 (1976) (per curiam) (citations omitted). Because of the potential chilling effect upon the exercise of vital First Amendment rights, the government may regulate expression and association only with narrow specificity and carefully drawn regulations which proscribe only unprotected, and not protected, expression. NAACP v. Button; Cantwell v. Connecticut, 310 U.S. 296 (1940).

Section 441b(a), which circumscribes corporate expenditures "in connection with" a federal election, does not meet these long established constitutional standards. Given the breadth of interpretation applied by the FEC, the statute fails to clearly mark the boundaries between

affected and unaffected conduct with narrow specificity. Would, for example, the FEC have deemed the MCFL newsletter to be an expenditure if the organization had published the newsletter on the same date but had dropped the admonition to vote pro-life? How prominent must an issue be in a given federal election for statements regarding that issue to be deemed "connected" with the election? May an interview of a candidate be published if there is no mention of an impending election? May an organization exhort the importance of voting only for candidates who hold a particular view if no identification is made of those candidates? Or is any reference to an election, or to the act of voting, necessarily made "in connection with" an election? Does a publication become connected with an election only by proximity of date, or only by content, or are both date and content required? Without answers to these and many other questions, no publicly spirited group can safely publish its views on either issues or individuals without facing

possible civil or criminal prosecution by the FEC.

The inhibiting impact of the FEC's preferred broad prohibition against corporate expenditures "in connection with" an election, if upheld, cannot be overestimated. MCFL is by no means unique in its position. Virtually every non-partisan, issue-oriented, non-profit corporation speaks or may wish to speak on matters of public importance. Any issue of such societal importance as to have spawned a supporting — or, for that matter, an opposing — organization is also likely to appear in one form or another as an electoral campaign issue. What more important topic for speech could there be for an issue-oriented group than the positions that candidates may have on those very issues which are the core of the organization's philosophy and purpose?

This point was acknowledged by the Court of Appeals in Buckley v. Valeo, in striking down Section 437(a) of the Federal Election Campaign

Act. In that case, the Court of Appeals held one provision, s.437(a), unconstitutionally vague and overbroad on the ground that the provision is "susceptible to a reading necessitating reporting by groups whose only connection with elective process arises from completely non-partisan public discussion of issues of public importance." No appeal was taken from that holding. Buckley, 519 F. 2d at 10, n. 7.

While the corporate structure of the various plaintiff organizations is not discussed in the Buckley case, the First Amendment implications of restricting discussion of candidates' qualifications, voting records and positions on campaign issues is thoroughly analyzed. In discussing the impact of s.437(a) on a specific plaintiff, the New York Civil Liberties Union, the Court noted that the organization publicizes in newsletters and other publications the civil liberties voting records, positions, and actions of elected officials, some of whom are candidates

for public office. In addition to the Civil Liberties Union, the Appeals Court also identified trade and professional journals, campus newspapers, union newsletters and even church bulletins as being potentially restricted by the Act. "Indeed, 'every Little Audubon Society Chapter' [might] be [interrupted], for 'environment' is an issue in one campaign or another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizens' rights' [might] fall under the Act." Id. at 871.

The Court of Appeals in Buckley also reviewed the dilemma faced by organizations attempting to comply with the statute.

Discussions of [public issues which are also campaign issues], and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence in voting at elections. In this milieu, where do 'purpose' and 'design' 'to influence' draw the line? Do they connote

subjectively a state of mind, or objectively only a propensity of influence? Do they require, inspection of state of mind, a capability of influencing, and if so how substantial a capability? What do they demand with respect to materials which 'advocat[e] the election or defeat of [a] candidate' or which 'set forth the candidate's position on [a] public issue' or 'his voting record,' beyond the inherent tendency of these materials to influence? Id. at 875.

The chill on constitutionally protected speech by similarly vague language is illustrated by a review of other FEC enforcement actions under the Act. Examples include actions filed by the FEC against a citizens' group for limited taxation for publishing voting records on tax issues, FEC v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d 45 (2d Cir. 1980); prosecution of a committee which had paid for an advertisement appealing for the impeachment of the President and listing Congressmen who were recorded in favor of impeachment, United States v. National Impeachment Committee, 469 F. 2d 1135 (2d Cir. 1972); and an action against a union for

publishing and circulating a poster depicting former President Ford wearing a button reading "Pardon me" and embracing former President Nixon, FEC v. AFSCME, 371 F. Supp. 315 (D. D.C. 1979).

In each of the aforementioned cases, the Court determined that the FEC's reading of the statute was overly broad, and that the actions or publications of the organization at issue were permissible under the Federal Election Campaign Act.

How many more prosecutions by the FEC of non-profit, nonpartisan, issue-oriented organizations will be instituted before such groups, often ill-equipped to absorb the expense of defending their speech, will simply be forced to cease publishing their views? Is it not incongruous with the preferred position given to First Amendment rights, that individuals seeking to exercise these rights must justify their conduct and bear the costs of such justification before the FEC or in court when both the law and

its administering agency have failed to provide cognizable and well-defined standards? The chilling effect of this vague statute raises a spectre of all the evils which the First Amendment was designed to prevent. As Judge Kaufman stated, in a stinging rebuke to the FEC,

[I]f speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wide of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526 (1958), thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of the government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized. Accordingly, it is not completely surprising that the FEC should view the content of defendants' leaflet in a substantially different light than the members of this court ... Buckley v. Valeo, supra, imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the

Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility. FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d at 54. (Kaufman, C.J., concurring).

In the instant case the FEC has again failed to exercise its powers in a manner harmonious with a system of free expression.

III. THE MCFL PUBLICATION IS PROTECTED BY THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND ASSOCIATION.

The First Amendment protects political expression in order to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). As this Court has noted, "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Buckley 424 U.S. at 14. If

speakers are not granted wide latitude to disseminate information, citizens will be deprived of valuable information and opinions. FEC v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d at 55 (concurring opinion).

In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. Buckley, 424 U.S. at 15.

Because the First Amendment guarantees not only the right to hear, but also the right to receive information, the Amendment has been held to protect not only the right to speak but also the right to publish, circulate or distribute that speech. Thus, "[T]he right of freedom of speech and press includes, not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought and freedom to teach

..." Griswald v. Connecticut, 381 U.S. 479, 482 (1965). (emphasis added). Furthermore, "[L]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulating the publication would be of little value." Lovell v. Griffith, 303 U.S. 444, 452 (1937).

The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. First National Bank, 435 U.S. 765, 777 (1971). As the Court asserted in invalidating a Massachusetts statute prohibiting corporate speech on referendum issues:

In the realm of protected speech, the Legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972). If a Legislature may direct business corporations to "stick to business," it also may limit other corporations — religious, charitable

or civic — to their respective "business" when addressing the public. Id. at 785.

Freedom to associate for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Constitution. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 375 U.S. 449 (1966). "The right of 'association,' like the right of belief ... is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." Griswald, 381 U.S. at 483. This right is most fundamentally applied to associations formed for the purpose of political expression. "[O]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). In fact,

"[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association..." Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, 454 U.S. 290, 295 (1981). Its value lies in the fact that by collective effort individuals can make their views known, when individually their voices would be faint or lost. Id. at 294.

Given that the right of association to espouse social or political views is a fundamental right, under the First Amendment the question remains whether that right is diminished or even disappears when the group chooses to associate as a non-profit corporation. Contrary to the FEC's argument, Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982), is not dispositive on the application of the Federal Election Act on non-profit contributions, since that case focused on solicitations for contributions, and not on independent expenditures. In fact, the Court specifically

noted that "NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propogate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." FEC v. National Conservative Political Action Committee, 105 S.Ct. 1459, 1468 (1985).

MCFL, if unincorporated, could have spoken on candidates' voting records and pro-life positions, and could actively have advocated the election of individual candidates. California Medical Ass'n. v. FEC, 435 U.S. 182, 195 (1981). That right does not evaporate simply because MCFL chose to incorporate. Even the dissenting Justices in First National Bank acknowledged the specific problem of restricting the speech of non-profit corporations. "Undoubtedly, as this Court has recognized ... there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members or, as in the case of the press, of disseminating information and ideas. Under such circumstance,

association in corporate form may be viewed merely as a means of self-expression." 435 U.S. at 805. This principal has recently been reiterated in National Conservative Political Action Committee in which this court stated,

NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify their voices ... To say that their collective action in pooling their resources to amplify their voices is not entitled full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to buy expensive media ads with their own resources. 105 S.Ct. at 1467-68.

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. Common Cause, 512 F. Supp. at 497. Virtually every means of communicating ideas in today's mass society

requires the expenditure of money. The distribution of the most humble handbill or leaflet entails printing, paper and circulation costs. Buckley, 424 U.S. at 19. To limit, or, in this case, prohibit the association from making expenditures to publish a newsletter or pamphlet precludes the association from effectively amplifying the voice of its adherents, the original basis for the recognition of a First Amendment protection of association, Id. at 22. "[A]llowing the presentation of views [while limiting expenditures] is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." National Conservative Political Action Committee, 105 S.Ct. at 1467. To restrain the ability of an independent association to expend resources on political expression is simultaneously to interfere with the freedom of its adherents. Buckley, 424 U.S. at 22.

IV. THE PUBLICATION OF THE MCFL NEWSLETTER MAY NOT BE PROHIBITED ABSENT A COMPELLING GOVERNMENTAL INTEREST.

A. The FEC Has Failed to Demonstrate a Compelling Government Interest in Prohibiting This MCLF's Publication.

As the Court of Appeals determined, "s.441b must be considered a content-based restriction on expression and may be justified only by a showing of substantial government interest." FEC v. MCLF, 769 F.2d at 22. Not only must the government demonstrate that a compelling interest exists, but it must also prove that the statute is closely drawn to avoid unnecessary abridgement of First Amendment rights. First National Bank, 435 U.S. 765.

In the area of political speech the government has sought to limit or restrict expression through the imposition of ceilings on expenditures and contributions to candidates and political parties. In support of these limitations, the government has traditionally advanced the following

justifications: (a) to prevent corruption or the appearance of corruption; (b) to reduce the political impact or influence of wealthy individuals or groups; and (c) to limit the costs of election campaigns. Of these three stated governmental interests, this Court has concluded that only the first is constitutionally sufficient to warrant restrictions on political expression. Buckley, 424 U.S. at 26.

While accepting the government's professed intent to protect the electoral process from corrupt influence, as justification for some measure of restriction, the Court has also found that only a limitation on contributions, and not a limitation on expenditures, furthers this aim appropriately and narrowly enough to survive constitutional challenge. The rationale for this distinction is that "[T]he absence of pre-arrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the

candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments." Id. at 47.

MCFL'S expenditure here was not coordinated with any campaign or candidate. The opportunity to exact a quid pro quo was non-existent. Indeed, the exposure of a candidate's views on right to life issues could be either a benefit or a burden in attracting a voter's support. The clear beneficiary of the information included in the newsletter was, therefore, not the candidates for election, but the voting public who received important information not available elsewhere.

While the prevention of corruption has been identified as the compelling governmental interest behind the Federal Election Campaign Act, this Court has also sought to protect individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. National

Right to Work Committee, 459 U.S. at 207-208. This is not a legitimate concern in this case. As the Court of Appeals noted, "contributors to MCFL need not be protected from having their money used for expenditures such as the Special Election Edition. Individuals who contribute to MCFL do so because they support MCFL's anti-abortion position and presumably would favor expenditures for a publication that informs contributors and others of the position of various candidates on the abortion issue. This would appear to be the very purpose of the organization and the contributions to it." FEC v. MCFL, 769 F.2d at 23.

Moreover, even the stockholders of a for-profit corporation retain other remedies against an expenditure if corporate funds for political purposes with which they disagree. They may, of course, sell their stock, band together to vote the responsible officers out of office, or in the extreme case, bring suit for the mis-application of corporate funds. The Federal

Election Campaign Act is neither necessary, nor was it intended, to provide additional protections to the stockholders, and particularly not at the expense of the important First Amendment rights at stake in this case.

B. The Prohibition Against Corporate Expenditures is Unnecessarily and Impermissibly Broad.

Even if a compelling interest could be found to justify restrictions on corporate speech, the prohibition contained in the Federal Election Campaign Act, as interpreted by the FEC in the instant case, is not sufficiently narrow to satisfy constitutional standards. Rather than prohibiting only those types of corporate contributions which could lead to corruption, or even the appearance of corruption, the FEC attempts to interpret the statute to blindly prohibit any and all corporate expenditures having even the slenderest of connections with an election.

As this Court has acknowledged, "the 'differing structures and purposes of different entities' may require different forms of regulation in order to protect the integrity of the electoral process" National Right to Work Committee 459 U.S. at 210, quoting California Medical Associates v. FEC, 453 U.S. 182, 201 (1981). "A corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." National Conservative Political Action Committee, 105 S.Ct. at 1468. Yet, where the law requires that the restriction of First Amendment rights be carved out with a scalpel, the FEC has used a hatchet.

A narrow prohibition may be easily drawn to protect the government's valid interest, yet allow constitutionally protected speech: prohibit corporate contributions in elections, but permit independent expenditures by such entities provided

that there is full disclosure that the expenditure is made by a corporation. Prohibiting corporate contributions to candidates would prevent the possible purchase of candidates, the concern identified by the Court as the only valid compelling governmental interest in restricting political speech. Allowing such independent expenditures but requiring disclosure would permit constitutionally protected speech, while serving to notify the public that it is hearing corporate rather than individual speech. Permitting speech only with full disclosure would conform to guidelines set by the Supreme Court:

The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. First National Bank, 435 U.S. at 791.

CONCLUSION

The Home Builders Association of Massachusetts submits that Massachusetts Citizens For Life's publication of the special election edition newsletter did not constitute an expenditure in connection with a federal election in violation of 2 U.S.C. s.441b. Amicus further submits that the application of this statute to that publication is a violation of the First Amendment to the United States Constitution.

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No. 85-701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,

Appellants,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF FOR
THE CATHOLIC LEAGUE FOR RELIGIOUS
AND CIVIL RIGHTS, AMICUS CURIAE,
IN SUPPORT OF APPELLEE**

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League has a strong interest in the protection of expressional rights, especially in cases like this one in which the exercise of these rights is associated with the right to life. The League will often file amicus curiae briefs or initiate litigation to preserve expressional rights associated with matters in which the League is primarily concerned. For example, the League recently filed briefs amicus curiae before this Court in *Bender v. Williamsport Area School District*, No. 84-773, in which the right to free expression on religious matters was at issue. Similarly, League attorneys have served as attorneys in federal court for parties seeking to invalidate restrictions against speech on behalf of the right to life of the pre-born. See *Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985), appeal docketed No. 85-2950 (7th Cir. Nov. 7, 1985).

The question of law which the League proposes to address is whether the press exemption of 2 U.S.C. § 431(9)(B)(i) should prevent the application of the involved federal election law to the special election edition newsletter published by Massachusetts Citizens for Life, Inc. The League takes the position that this statutory exemption to federal election laws should apply to the newsletter involved in this case. This issue will probably not be fully treated by the parties. Massachusetts Citizens for Life will likely not deal with this issue extensively because it is understandably likely to concentrate its efforts on upholding the favorable ruling issued by the Second Circuit on constitutional grounds. An attorney associated with Massachusetts Citizens for Life indicated to a League representative at one point that Massachusetts Citizens for Life might not be able to develop this

issue fully because of space limitations in its brief. The Federal Election Commission will not argue for a statutory exemption as the League will. This statutory issue is clearly relevant to this case because a ruling extending the statutory press exemption to the newsletter involved in this case would allow this Court to uphold the Second Circuit's ruling without deciding unnecessary constitutional issues.

The League has obtained the consent of counsel of record for Massachusetts Citizens for Life to the filing of this brief. The original of that letter has been filed with the Clerk. However, counsel for the Federal Election Commission has refused to grant such consent. Although counsel for the Federal Election Commission appears to have mistakenly believed that Rule 36.3 applies to the form of request for consent directed to a party rather than the form for motions for leave to file briefs amicus curiae, it appears clear from his letter filed with the Clerk that consent for the filing of this brief would be refused in any case.

For the foregoing reasons, the League moves to file the appended brief amicus curiae.

Respectfully submitted,

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IN SUPPORT OF APPELLEE**

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

This Court can uphold the court of appeals decision on the basis that the special election edition newsletter published by Massachusetts Citizens for Life, Inc. fits within the statutory press exemption of 2 U.S.C. § 431(9)(B)(i). Thus, it is unnecessary to determine the constitutional issues presented.

The district court below correctly concluded that the special election edition newsletter fit within this press exemption to the rules restricting certain contributions to political candidates. See *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646, 650-651 (D. Mass. 1984).

The district court appropriately rested its decision upon Congress' understandable intent to establish a press exemption coextensive with broad First Amendment freedoms. See *id.* at 650. This intent is reflected in legislative history. The district court, for example, noted that a House Committee report stated that "it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association." *Id.* (quoting H. R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974) (emphasis court's)). Congress was certainly aware of the expansive scope accorded freedom of the press in this Court's decisions. In light of Congress' desire not to burden the exercise of freedom of the press, it would make little sense for Congress to make an essentially constitutionally based press exemption dependent upon factors such as a paper's masthead or normal circulation which have nothing to do with the presence of constitutionally protected freedom of the press. Accordingly, congressional intent, examined in light of relevant First Amendment precedent, requires the conclusion that Congress intended the press exemption to apply to the facts of this case.

This method of analysis is also supported by two lower federal court decisions construing the press exemption. Both of these decisions found publications in question to be within the press exemption despite Federal Election Commission arguments that certain technical requirements for the press exemption were not met. These cases correctly implemented Congress' desire that the involved legislation not impinge upon First Amendment freedoms. Application of their method of reasoning to this matter would properly permit dissemination of the special election newsletter without necessity to determine the constitutional validity of the federal election legislation.

ARGUMENT

I.

CONGRESS INTENDED 2 U.S.C. § 431(9)(B)(i) TO BE READ BROADLY IN ORDER TO AFFORD A PRESS EXEMPTION WHICH WOULD FULLY ALLOW DISSEMINATION OF PUBLICATIONS ENJOYING THE CONSTITUTIONAL PROTECTION OF THE FIRST AMENDMENT'S RIGHT TO FREEDOM OF THE PRESS.

In passing the legislation associated with 2 U.S.C. § 431(9)(B)(i), Congress wisely chose to include a press exemption. This action was intended to insure that the legislation would not be applied to cases, like this one, in which such application would offend constitutionally guaranteed freedom of the press.

Evidence of Congress' desire to prevent application of its legislation to cases implicating constitutionally protected freedom of the press may be found in a House of Representatives Committee Report. H. R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974) (hereinafter H. R. No. 1239). That report, as quoted by the district court, stated: "it is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646, 650 (D. Mass. 1984) (quoting H. R. Rep. No. 1239 at 4 (emphasis court's)).

Additional legislative history further reflects Congress' desire to permit the type of communication involved in this case. For example, much of the impetus for the enactment of the press exemption may be traced to concerns of Representative Orval Hansen that the original legislation not be construed to impede First Amendment freedoms. See H. R. Rep. No. 1239 at 4. For example, in debate on the enactment of the original legislation, Representative Hansen noted:

As the Supreme Court stated in [*United States v. Congress of Industrial Organizations*], if Congress were to prohibit communications between an organization and its members concerning "danger or advantage to their

interests from the adoption of such measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

117 CONG. REC. 43,380 (1971) (statement of Rep. Hansen) (quoting *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121 (1948)).

Obviously Congress' desire was that the press exemption would protect all publications financed by voluntary contributors which are traditionally entitled to the enjoyment of freedom of the press. Congress was certainly well aware of the expansive protection which this Court's decisions have accorded freedom of the press in electoral matters. For example, in *Mills v. Alabama*, 384 U.S. 214, 218-220 (1966), the Court invalidated Alabama's attempts to prevent newspapers from including editorials on election day which urged people to vote a particular way in the involved election. The Court noted that:

The Constitution specifically selected the press which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of powers by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills, 384 U.S. at 218.

In light of clear legislative history and Congress' knowledge of the broad interpretation this Court has accorded freedom of the press in electoral matters, it defies logic and common sense to conclude that an essentially constitutionally based exemption depends upon such technical features as a newspaper's masthead or its ordinary circulation. The Second Circuit correctly concluded that the expressional activity involved in this case was constitutionally protected. However, a fair reading of legislative intent in light of this Court's

precedent could also have sustained dissemination of the newsletter on the basis of the application of the statutory press exemption.

II.

APPLICATION OF THE PRESS EXEMPTION TO THIS CASE ACCORDS WITH OTHER FEDERAL COURT CONSTRUCTIONS OF THIS EXEMPTION.

Support for a broad application of the press exemption intended by Congress can also be found in two previous lower court decisions construing 2 U.S.C. § 431(9)(B)(i). See *Federal Election Commission v. Phillips Publishing Co.*, 517 F. Supp. 1308 (D.D.C. 1981), *Reader's Digest Association v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981). In both these cases the courts avoided utilizing overly technical analysis to deny statutory press exemption to normal press functions which would also enjoy constitutional protection.

For example, in *Federal Election Commission v. Phillips Publishing Co.*, 517 F. Supp. 1308 (D.D.C. 1981), the court did not find the content or the format of the specific issue of a political publication to be of great importance in deciding that the document was entitled to the protections guaranteed by the statutory press exemption. See *id.* at 1309-1314. The court utilized this constitutionally and statutorily correct mode of analysis despite the Commission's itemization of physical differences distinguishing the involved issue from others previously published by the same entity, and the Commission's determination that these differences precluded the utilization of the exemption found in 2 U.S.C. § 431(9)(B)(i). See *id.* at 1310-1311. In its decision, the court acknowledged that a publication need not be issued only to the current members or circulation, but that "[b]ecause the purpose of the solicitation letter was to publicize [the publication] and obtain new subscribers, both of which are legitimate press functions, the press exemption applies." *Id.* at 1313.

Similarly, in *Reader's Digest Association v. Federal Elec-*

tion Commission, 509 F. Supp. 1210 (S.D.N.Y. 1980), the court relied on the broad nature of the First Amendment in finding that the press exemption of 2 U.S.C. § 431(9)(B)(i) would protect a videotape which was produced to advertise a publication and was submitted to television stations for telecast, even though the tape depicted a political message directed at a candidate. This activity was found to be within the normal functions of a press entity. *Id.* at 1215. In so holding, the court accommodated the competing concerns of "the Commission's duty to investigate possible violations," and "the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions." *Id.* at 1215.

Both lower courts made their determinations based on interpretations of the statutory press exemption which properly implement Congress' intent to protect the full exercise of freedom of the press. These courts correctly realized that Congress' intent was to establish a broad press exemption in 2 U.S.C. § 431(9)(B)(i) which would preclude application of the statute to constitutionally protected activity. Applying this mode of interpretation to the instant case would result in a conclusion protecting Massachusetts Citizens for Life's exercise of freedom of the press in communicating with its pro-life oriented clientele without calling into question the involved legislation's constitutional validity.

CONCLUSION

The Court of Appeals' ruling upholding Massachusetts Citizens for Life's right to publish its special election edition may be upheld on the basis that the newspaper is a publication fitting within the press exemption of 2 U.S.C. § 431(9)(B)(i) without the necessity of reaching the constitutional questions.

Respectfully submitted,

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